[COMMITTEE PRINT]

A REPORT

ON THE

INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BASED ON A STUDY OF SELECTED DISTRICT OFFICES

BY THE STAFF OF THE

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
99TH CONGRESS, SECOND SESSION

MAY 1986

THIS REPORT HAS NOT BEEN OFFICIALLY ADOPTED BY THE COMMITTEE ON EDUCATION AND LABOR AND MAY NOT THEREFORE NECESSARILY REFLECT THE VIEWS OF ITS MEMBERS

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Executive Summary

The Committee on Education and Labor of the U.S. House of Representatives is charged with the responsibility for overseeing the agencies established to enforce the federal equal employment opportunity laws. Consistent with this mandate, Committee staff conducted a series of on-site reviews of selected district offices of the Equal Employment Opportunity Commission (EEOC) during November and December of 1985. Staff investigated a number of issues of concern to the Committee including: the effect of the implementation of recent directives relating to goals and timetables and to the overall enforcement posture of the agency; the status of the case processing operations; the use of performance standards in employee evaluation; and the impact of the reorganization of 1984 on the overall enforcement program.

Two offices in each of the three EEOC regions were visited by majority staff of the full Committee on Education and Labor and the Subcommittee on Employment Opportunities. Minority staff were invited to participate in all of the site visits but only had the opportunity to visit the Houston, Los Angeles, Chicago and St. Louis District Offices. The offices selected included New York, New York and Birmingham, Alabama in Region I; St. Louis, Missouri and Chicago, Illinois in Region II; and Houston, Texas and Los Angeles, California in Region III. These district offices were selected on the basis of the following criteria: geographic diversity, volume of case load, and in some instances, information received (positive or negative) regarding individual district offices.

Committee staff interviewed the district directors, regional attorneys, most compliance managers and supervisors of the enforcement units in the district offices visited. EEOC compliance and legal staff were also interviewed. Upon completion of the site visits, staff received additional case processing statistics from the headquarter's Office of Program Operations.

While many of the findings in this report are critical and suggest that immediate attention be paid to the problems noted herein, this report is not intended to impugn the Equal Employment Opportunity Commission as an entity, or any of the individuals mentioned. Overall, Committee staff found that there was a sincere interest in and commitment to the mission of the agency and that, in general, EEOC staff demonstrated initiative and a desire to assist those for whom the EEOC was established: victims of unlawful employment discrimination.

IV

Major Findings

EEOC POLICIES

The Commission's Acting General Counsel, Johnny J. Butler, orally directed the Commission's Regional Attorneys that they were not to recommend the use of goals and timetables in consent decrees or to intervene in cases in which goals and timetables are proposed as a remedy for discrimination.

Committee staff later discovered that the Acting General Counsel also instructed the legal staff not to seek the enforcement of goals and timetables in existing consent decrees as well as in future ones. This information was later confirmed by Mr. Butler at a hearing before the Subcommittee on Employment Opportunities on March 11, 1986. That "goals and timetables are dead" was conveyed by headquarters to the non-legal, compliance staff as well.

Mr. Butler's oral directive was made in the absence of a Commission vote or other enunciated change in policy. This action arguably constitutes an abuse of his prosecutorial authority under Section 705 of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. Section 2000e *et seq.* (1982). Nor was there any effort on the part of the Acting General Counsel or the Chairman, Clarence Thomas, who sanctioned Mr. Butler's actions, to comply with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. Section 551(4) (1982), to the extent that this directive constitutes a "rule," as defined by the APA to include any "agency statement of general or particular applicability and future effect designed to implement . . . law or policy. . . ."

Goals and timetables and other numerical remedies have been approved by the U.S. Supreme Court and have been ordered by courts in many instances when necessary to remedy the effects of class-wide discrimination. Moreover, this directive flies in the face of earlier positions taken by the EEOC and by the Acting General Counsel, in defense of goals and timetables. It also conflicts with the EEOC's current Affirmative Action Guidelines, 29 C.F.R. Sec. 1608.4(c)(1)(1985) and the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Sec. 1607 (1985).

Class action cases or charges which do not identify "actual victims" are now reported to be unacceptable to the Commission. Remedies for discrimination are limited to "identified victims."

Committee staff were informed that the Commission will not consider for litigation any class action case in which "reasonable cause" has been found unless specific individual victims—presumably in addition to the complainant or "charging party"—are located and interviewed. Moreover, remedies for discrimination appear to be limited to "identified victims". Prior to this shift in enforcement posture, the EEOC would seek, where appropriate, prospective relief such as goals and timetables in order to correct an employer's discriminatory employment practices. Such an approach was used because it is often difficult to identify "victims" on the basis of the limited information which can be obtained in an EEOC investigation.

Often, identifying specific victims requires the development of a full trial record. Thus, in cases such as those in which there are many more unhired female or minority applicants than there are vacancies which would have gone to women or minorities in the absence of discrimination, it is impossible to identify which specific individuals would have been hired in the absence of discrimination. For these reasons, courts have preferred a "class-wide" approach under which all members of the class adversely affected by the discriminatory act are presumptively entitled to individual relief. Courts have also used prospective relief such as goals, in order to attack systemic discrimination. Providing relief for only a few identified victims, when the discriminatory practices were more pervasive, was viewed as inadequate.

The effect of this shift in EEOC's enforcement posture will be to preclude many, if not most, of a group of discriminatees from obtaining any relief, particularly when, after years of litigation, it is impossible to identify all of the individuals who would have been hired or promoted in the absence of lawful discrimination. Recent EEOC statistics appear to confirm this conclusion. A recent report by Women Employed Institute, a Chicago based women's advocacy organization which monitors the EEOC, found that in the first half of 1985, only 2,964 victims of discrimination received monetary benefits through charges filed with the agency. In 1980, 15,328 persons received such benefits.

This new policy is consistent with the Justice Department's interpretation of *Firefighters Union Local 1784* v. *Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984), which held that a lower federal court could not modify a consent decree (settlement between the parties and sanctioned by the court) that contained numerical remedies, in derogation of a *bona fide* seniority system. The Justice Department and the EEOC have read the *Stotts* decision to preclude all race or sex-conscious relief except to "identified victims of discrimination." This argument has been rejected by every U.S. court of appeals before which this argument has been presented by the Justice Department.

The EEOC's "Statement of Enforcement Policy" of September 11, 1984, has been interpreted by many in the Commission's district offices to permit, in practice, a new, higher standard of proof to establish "reasonable cause" to believe that an individual or a class has suffered illegal discrimination.

The new enforcement policy requires that the Commission review every charge in which "reasonable cause" is found and attempts at conciliation (settlement) have failed, in order to determine whether EEOC will institute litigation. Before issuing a reasonable cause determination, the district director must obtain from the regional attorney in his or her office an analysis as to whether the evidence supports a finding of reasonable cause. Previously, the district offices could determine which "litigation-worthy" charges it would forward to headquarters for litigation approval.

While few were able to articulate what the reasonable cause ("litigation-worthy") standard required before the issuance of the September 1984 statement, it was reported that there is now, in practice, a more stringent standard by which to prove "reasonable

cause." Theoretically, the regional attorney's analysis must be based on a standard which determines that it is *more likely than not* that the charging parties suffered discrimination. This reasonable cause standard requires a quantum of evidence sufficient to establish a *prima facie* case of discrimination, and to rebut, at least in part, the respondent's (employer) explanation for its actions. In practice, it was admitted that because "cause" determinations are given closer scrutiny by upper level management, staff, fearing a reversal of their recommendations, are less likely to find "cause," particularly when the facts of a charge are not clearly compelling. As one EEOC attorney stated, "If there is a toss-up between cause and no cause, [staff will find] no cause." Moreover, by voting "no cause," attorneys in the district offices can control their rapidly expanding dockets, eliminating borderline charges which, if litigated, would be of questionable impact and may be lost on the merits. Thus, the effective reasonable cause standard is whether the charge, if brought to trial, could be won.

One possible effect of this new standard is that fewer charges are given a "cause" determination to indicate that the EEOC has found that there is reasonable cause to believe that a charging party or class has suffered discrimination. For example, in fiscal year 1985, over 56.2 percent of all new charges were determined to be "no cause," compared with 28.5 percent in 1980. This new, more-stringent standard may contravene the "reasonable cause" standard set forth in Title VII of the Civil Rights Act of 1964.

The "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination" has created confusion as to the amount of discretion available to EEOC staff in seeking "full relief," such as back pay, retroactive seniority, and in general, placement of a person in a position he or she would have held but for the unlawful discrimination.

The new remedies and relief policy, issued on February 5, 1985, requires, that "in appropriate circumstances:" (1) all employees of a (respondent) employer be notified of their right to be free of unlawful discrimination; (2) corrective action be taken to assure that the alleged discriminatory act does not recur; (3) each identified victim of discrimination be unconditionally offered placement in the position she/he would have occupied but for the discriminatory act; and (4) the identified victim of discrimination be made whole for any loss of earnings she/he may have suffered as a result of the discrimination. Employers must also sign and post a notice at the workplace, which indicates that (1) the notice is being posted as part of the agreed or ordered remedy; (2) federal law prohibits discrimination; (3) the respondent will comply with federal law; (4) the respondent will not engage in the conduct complained of in the action brought by the charging party; and (5) the respondent will take the remedial action required by the conciliation agreement, court order, or the EEOC.

While many EEOC staff interpreted the remedies policy to permit discretion as to the amount of relief one could insist on in negotiations with an employer (respondent), a significant minority suggested that the policy required an employer to provide full relief or relief that would make a discriminatee "whole." One pos-

sible effect of the new remedies policy may be the diminution of the number of conciliations attained. For example, in fiscal year 1982, settlements accounted for 29.4 percent of all case closures; in fiscal year 1985, only 14.4 percent of the charges processed were settled.

One prominent defense attorney in the Los Angeles area reported that since this policy was enunciated, conciliations between her clients and the EEOC Equal Opportunity Specialists (EOSs) have failed because of the EOSs' insistence that the charging parties obtain "full relief," even if, in the opinion of this lawyer, such relief was impossible to provide. While this effort by the district office staff may be commendable, it may be in conflict with Title VII of the Civil Rights Act, which encourages conciliations.

As full relief for an identified victim of discrimination requires that the employer post a notice, which is tantamount to a confession of guilt, Committee staff were informed that many employers would rather incur the expense of a trial instead of admitting at the conciliation stage that they actually discriminated. Prior to the issuance of this policy statement, employers could negotiate the quantum of relief, without having to admit guilt, and the charging party received redress for his/her complaint.

Moreover, this remedies policy may be a total bar to conciliations and settlements since, in addition to refusing to voluntarily concede guilt, most employers, where full relief is required, will always litigate the eligibility of each alleged "identified" victim to receive such full relief. Thus, the policy ultimately encourages protracted and costly litigation and is wholly impractical, given the Commission's limited resources.

The Commission has reportedly renounced the adverse impact theory to prove discrimination, which was enunciated by the U.S. Supreme Court in Griggs v. Duke Power, *401 U.S. 424 (1971).*

This policy change, like the goals and timetables policy, was apparently accomplished by oral fiat and conflicts with the Commission's own Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Section 1607 (1985), which embody this court-approved theory.

Under the adverse impact theory, employers' ostensibly neutral hiring and promotion requirements, such as aptitude tests and high school diplomas, which have an adverse impact on women and minorities, are presumed to be discriminatory unless justified by business necessity. This standard of proof is used in class action cases and has been effective in combatting pervasive discrimination. Now, when class action cases are referred to headquarters for approval, EEOC lawyers must articulate other theories to prove discrimination (other than intentional discrimination) such as "disproportionate exclusion." What the latter standard means legal unit attorneys did not (or perhaps could not) explain, however.

ADMINISTRATIVE AND PERSONNEL PRACTICES

There is an increasingly greater emphasis on the rapid closure of cases at the expense of quality investigations. Moreover, attempts have been made to "pad" the number of charges processed in order

to present better case processing statistics and to make some district offices "look good."

Some EEOC staff investigators reported that they are compelled, under threat of a low performance rating, to prematurely close an investigation rather than miss a supervisor-imposed deadline or to have a charge in the inventory longer than 300 days. As a result, some meritorious charges may be unjustifiably closed and given a "no cause" because the investigation of the charge was incomplete. In Chicago, Committee staff learned from Women Employed Institute, a local organization which monitors the EEOC, that a charging party who had received a "no cause" finding, subsequently filed suit in federal court and won. Another person who received a "no cause" obtained her charge file and found that no investigation of the charge was ever done beyond the perfunctory collection of minimal data from the employer.

A 1985 internal audit of the case processing management in the Chicago District Office corroborates the information received by Committee staff concerning the problem of inadequate investigations conducted in that office. The audit report stated that ". . . cases often appear improperly concluded or written up largely on the statements of respondents." The report also found that, in some cases, witnesses were not contacted and possible class-based allegations were not investigated.

In the Birmingham District Office, it was stated that there was a wholesale closure of cases at the end of fiscal year 1985, ostensibly, in order to "pad" the workload statistics and to show that that district office had processed an impressive number of charges that year. Information subsequently received appears to support this allegation. Other inventive means of inflating the number of case closures were also cited, such as treating one actual charge of discrimination against a company with multiple facilities as multiple charges; and counting the complaints of several employees in the same company against the same employer as individual charges of discrimination, instead of as a class action, when these employees alleged that the employer had racial animus when he fired them en masse.

Morale among EOSs throughout the district offices visited appeared to be low.

Some EEOC staff admitted that because of the "push for numbers," they are being forced to produce a work product of poorer quality and minimal thoroughness. As a result, they have less pride in their work and feel that the mission of the agency is being undermined. This attitude on the part of EEOC staff may be due, in part, to the workloads of the EOSs, which were reported to be inordinately high, and to the performance standards which require staff to complete their investigatory or intake duties within strictly-enforced timeframes. For example, the average workload of the EOSs in the rapid charge processing units, which handle charges (complaints) of discrimination by individuals, is reported to vary between 85 to 100 charges per EOS at any one time. Some intake unit EOSs, who interview the potential charging parties and advise them of their rights to file a charge, are required to spend no more

than fifteen minutes to meet with a charging party and establish the scope and legitimacy of the charge and one hour to complete the intake charge process. To meet this requirement, EOSs may have to interrupt a charging party without giving him or her sufficient time to "tell the story in his or her own words."

The 1984 downgrading of intake unit EOSs to GS 9, 7, and 5 levels has reportedly had major, adverse repercussions throughout the charge processing system.

The intake unit EOSs are the first persons which the public encounters at the EEOC and are responsible for obtaining the initial information from the charging parties, advising them of their rights under law and making the initial judgments as to the merits of the charges. Although the intake units' responsibilities require seasoned, knowledgeable personnel, the effect of the downgrading has been to staff the units with persons with less experience and training to perform this essential function. The quality of the work product generated by the intake units has therefore, reportedly declined.

The EEOC is reportedly conducting superficial and insubstantial quality reviews of the work of the State and Local Fair Employment Practices Agencies (FEPAs) in some district offices.

Charging parties may file complaints directly with the EEOC or with certain state and local Fair Employment Practices Agencies (FEPAs). These FEP agencies, authorized under Section 706 of Title VII, enter into work-sharing agreements to receive and process charges deferred to them by the EEOC. Essentially, these agreements are contracts which establish charge processing procedures between EEOC and the deferral or "706 Agency," for which EEOC contributes funds for the FEP agency's operations.

District office staff reported that the inadequate review of state and local FEPAs is due, in part, to the understaffing of the state and local program, the downgrading of intake unit staff, the increase in charges filed and the shift of responsibility for conducting this work to the intake unit staff which is already overburdened. Another problem which was identified is that FEPAs, which are generally paid approximately $400 for every charge processed under contract, irrespective of the complexity of the charge, have no incentive to do thorough investigations or class actions. Overall, the state and local program appeared to be poorly structured and severely understaffed, particularly in district offices which must monitor a large number of FEPA contracts.

The amount of formalized training provided to EOSs throughout the charge processing system is severely limited and consists of a mélange of ad hoc programs which vary in length and quality, depending upon the district office involved.

This training program, which may include class instruction of several weeks or directions for EOSs to simply read the laws and regulations within EEOC's jurisdiction, supplements the on-the-job training which constitutes most of the instruction which new EOSs receive. Training for more experienced EOSs, in order to keep them abreast of the law, is virtually non-existent.

Under the new enforcement procedures, which emphasize "fuller" investigations before initiating settlement negotiations, virtually no fact-finding conferences are being conducted by most district offices visited.

Fact-finding conferences are face-to-face meetings between a charging party and a respondent with EEOC serving as a moderator/mediator. The purpose of these meetings is to achieve a quick negotiated settlement agreement which resolves the discrimination charge before the EEOC has committed its limited resources to fully investigate the charge and establish whether there is a reasonable cause to believe that any of the anti-discrimination statutes have been violated. While not appropriate in every instance, Commission staff interviewed noted that fact-finding conferences were useful, in some instances, in resolving charges of discrimination.

Legal units, while faced with a potentially expanded litigation caseload as a result of the new enforcement policy, are severely hampered in their efforts by inadequate resources and litigation support services.

Legal unit attorneys, who uniformly expressed a willingness to handle the increased caseload resulting from the recent emphasis on litigating charges in which cause is found and conciliation efforts have failed, strongly urged that additional litigation support personnel and resources accompany this increase in litigation or the effective prosecution of discrimination complaints will be seriously threatened. Moreover, attorneys suggested that there was an insensitivity or unfamiliarity at headquarters with the resource requirements of litigators.

Both the expert witness procurement process and the subpoena enforcement review process were decried by virtually every attorney as being unduly multi-layered and cumbersome.

Expert witnesses are essential to employment discrimination litigation because they perform, for example, the important analyses of work-force statistics which are fundamental to proving class-wide discrimination. The procurement process, most of which occurs at headquarters, may be delayed from six months to a year. In some cases, the witnesses were approved after they were needed at trial.

Lastly, lawyers complained that the subpoena review process was unnecessarily multi-layered. A recalcitrant employer unwilling to voluntarily supply documentation to EEOC investigators can stop an investigation in its tracks. To obtain this information, the EEOC may issue a subpoena. To obtain compliance with this administrative subpoena, it is sometimes necessary to initiate a judicial enforcement proceeding. The General Counsel's Office at headquarters must approve the initiation of such an action. Attorneys complained of the unreasonable paperwork burden that they must undertake in requesting this action and of the inordinate delays (in some instances, several months) in obtaining approval. Such delays may give charging parties the impression that the Commission is merely "sitting on" their complaints. Attorneys felt that the pro-

cess demonstrated unnecessary oversight of routine litigation that they were competent to handle.

RECOMMENDATIONS

EEOC POLICIES

1. The Acting General Counsel should immediately rescind his oral directive to regional attorneys that they not refer proposed consent decrees which contain goals and timetables to headquarters for approval.

2. The Acting General Counsel should also exercise the responsibility accorded to him by Title VII of the Civil Rights Act of 1964 by enforcing existing consent decrees which contain goals and timetables, until such time as the courts have ruled that this remedy is inappropriate or no longer permissible.

3. The Commission should make clear to compliance staff as well as to the employer community and the general public that the EEOC will enforce the law as it exists and that it will continue to seek goals and timetables and other forms of prospective relief, where necessary, to remedy the effects of discrimination.

4. The Commission should conduct its policymaking openly and consistent with the requirements of the Administrative Procedure Act and the Sunshine Act.

5. The EEOC should rescind its apparent policy or practice of seeking remedies only for identified victims of discrimination and utilize all available remedies including prospective and formula relief where appropriate, insofar as such relief is permissible under court precedent.

6. The EEOC should make clear that the "reasonable cause" standard to determine whether the agency believes that a charging party has suffered discrimination, requires that quantum of evidence sufficient to state a *prima facie* case of discrimination, and to rebut, at least in part, a respondent's explanation for its actions. The standard does not require an amount of evidence sufficient to "win" a case if brought to trial.

7. The Commission should make clear to district office staff that whenever full relief is sought, they must pursue and seek to obtain all make-whole relief, including back pay and retroactive seniority.

8. The EEOC should continue to utilize the adverse impact theory to attack systemic discrimination in accordance with *Griggs* v. *Duke Power* and the Uniform Guidelines on Employee Selection Procedures.

ADMINISTRATIVE AND PERSONNEL PRACTICES

1. The EEOC and the Office of Personnel Management (OPM) should restore the equal employment opportunity specialists (EOSs) in the intake units to a maximum level of GS–11 and the intake supervisors should be upgraded to the GS–13 level. These changes would ensure that a charging party is provided adequate information during the intake process and would promote quality work in perfecting the case file, which is the basis for the administrative processing of the charge.

2. The EEOC should issue a directive to district office staff stating that the charges in investigation at the EEOC, particularly those over 300 days old, should not be closed prematurely. Moreover, a comprehensive audit should be conducted with the intention of reopening cases which were investigated poorly.

3. The Commission should provide adequate travel funds for on-site investigations, in accordance with its emphasis on thorough and quality investigations.

4. The Commission should provide more formalized, on-going training opportunities for all EOSs in the intake units, as well as for investigators in the rapid and extended charge processing units, focusing on both discrimination law and investigative techniques.

5. The Commission should provide adequate staffing to the State and Local Program, as well as staff training, in order to better and more closely monitor and evaluate the work of the Fair Employment Practices Agencies (FEPAs) and cases submitted for substantial weight reviews.

6. The Commission should make available to field offices additional full-time-equivalent (FTE) positions, to be reserved for investigative and legal units and for support staff in those units, in order to enhance the agency's enforcement activities. Whenever FTE slots become available from headquarters, through attrition, those FTE slots should be transferred to field offices.

7. The Commission should undertake immediate efforts to streamline both the expert witness procurement process and the administrative subpoena enforcement process, with a view toward eliminating inordinate delays and unnecessary layers of review.

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I. INTRODUCTION

The Committee on Education and Labor, charged with responsibility for oversight of the enforcement of federal equal employment opportunity laws, conducted a series of on-site reviews of selected district offices of the Equal Employment Opportunity Commission (EEOC) during November and December 1985. These EEOC district office visits were prompted by concerns raised by individuals about inadequate EEOC processing of complaints, and concerns raised by others in Committee oversight and Appropriations Committee hearings regarding the enforcement, remedial and administrative policies of the agency.

The two-day site visits to two offices in each of the three EEOC regions were conducted by majority staff of the Committee on Education and Labor and of its Subcommittee on Employment Opportunities. Minority staff were invited to participate in all of the site visits but only had the opportunity to accompany majority staff during the visits to the Houston, Los Angeles, Chicago and St. Louis District Offices. The district offices selected by the Committee included New York, New York, and Birmingham, Alabama in Region I; St. Louis, Missouri, and Chicago, Illinois in Region II; and Houston, Texas, and Los Angeles, California in Region III. These district offices were selected on the basis of the following criteria: geographical diversity, volume of case load, and in some instances, information received (positive or negative) regarding individual district offices.

During these site visits, the staff investigated a number of issues of concern to the Committee, including (1) EEOC's case processing procedures; (2) implementation of policy directives, including the use of goals and timetables, the current emphasis on the rapid closure of cases, the recently enunciated Remedies and Relief Policy and the Enforcement Policy; (3) the effectiveness of the Expanded Presence Program and the State and Local Program; (4) the use of performance standards in employee evaluations and the effectiveness of employee training programs; and (5) the impact of the 1984 reorganization on the overall enforcement program.

The staff investigation consisted of interviews with the district directors, regional attorneys, compliance managers, as well as supervisors from individual enforcement units and programs. The Committee staff also interviewed supervisors, attorneys, investigators, intake officers, union representatives, and clerical personnel in each district office. A questionnaire, covering the issues of concern to the Committee, was used on each visit to ensure that similar information was sought and gathered at each site. Upon completion of all six of the site visits, the staff requested and received further information from the EEOC which supplemented the interviews and provided national data. While the district office staff were not selected scientifically, most of the professional staff at the

six district offices were interviewed. Thus, it is the view of Committee staff that the comments contained in this document reflect the majority view of the district office staff.

Where district office-level statistics were available to corroborate the information received during the interviews, it is provided throughout the report and in the appendices. Due to the reorganization of 1984 and the resulting change in the district office reporting format, only fiscal year 1985 data were available. Where appropriate, nationwide statistics for fiscal years 1981 through 1985 were provided in lieu of district-level data.

This report provides a general overview of each of the operating units involved in case processing, including detailed information on the systemic, compliance and legal units, their workloads, productivity and the quality of case processing. A significant portion of this report also focuses on the implementation and impact of recent policy changes on the district offices' staffing as well as on the investigation and litigation of charges. In the interest of protecting the identities of the district office staff who provided the information contained herein, specific references to the individual EEOC staff persons or, in some instances, to the district offices from which the information originated, have not been made.

Majority staff drafted the report and submitted to minority staff for review and comment first and second drafts thereof. Many revisions and additions proposed by minority staff were incorporated herein.

This report is intended to aid congressional oversight of the EEOC. It is hoped that the findings of this report will be used also by the EEOC to improve the efficiency of the agency's operation as prescribed by the civil rights statutes under its mandate. While many of the findings in this report are critical and suggest that immediate attention be paid to the problems noted herein, this report is not intended to impugn the EEOC as an entity or the persons mentioned. Overall, Committee staff found that there was a sincere interest in and commitment to the mission of the agency and that, in general, EEOC staff showed initiative and a desire to aid those for whom the agency was established in 1964: victims of unlawful employment discrimination.

The Committee staff wishes to thank the following persons for their assistance and cooperation in compiling the information for this report: Harriet Erhlich, Houston District Office Director; Leonora Guarraia, Los Angeles District Office Director; Edward Mercado, New York District Office Director; Kathleen Blunt, Chicago District Office Director; George Frank Jordan, Birmingham District Office Director; and John F. Nicholson, St. Louis District Office Acting Director. The Committee would also like to thank the EEOC headquarters office staff for its assistance in arranging the visits and in providing additional statistical data.

II. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ITS MISSION

The Equal Employment Opportunity Commission (EEOC) was established pursuant to the Civil Rights Act of 1964 as the agency charged with the enforcement of Title VII of the Act, *as amended,* 42 U.S.C. Sec. 2000e *et seq.* (1982), which prohibits employment discrimination on the basis of race, color, religion, sex or national origin. Since 1979, the EEOC has also administered the Age Discrimination in Employment Act of 1967, *as amended* (ADEA), 29 U.S.C. Sec. 621 *et seq.* (1982), the Equal Pay Act of 1963 (EPA) (1982), 29 U.S.C. Sec. 206(d)(1982), and Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 791 (1982). The ADEA protects workers aged 40 to 70 from discrimination in hiring, discharge, pay, promotion, fringe benefits, and other terms or conditions of employment by employers having 20 or more employees. The EPA prohibits sex discrimination in the payment of wages to women and men performing substantially equal work in the same establishment.

The EEOC receives and investigates charges of discrimination in these areas and makes findings of violation or no violation. The Commission may also initiate investigations on its own behalf. In the federal sector, the EEOC also administers the EPA, affirmative action planning, hearings, and the oversight of the processing of equal employment opportunity (EEO) complaints and appeals of agency decisions on these complaints filed under Title VII, ADEA, and Section 501 of the Rehabilitation Act, *as amended*, which prohibits handicap discrimination. Authority to administer these laws was transferred from other agencies to the EEOC under the President's Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (February 23, 1978).[1]

The EEOC also administers Executive Order 12067, *as amended,* 43 Fed. Reg. 28967 (1978), which requires oversight and coordination of all federal equal employment opportunity regulations, practices and policies. In so doing, the EEOC is to seek to maximize effort, promote efficiency, eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the federal departments and agencies having responsibility for enforcing the statutes, executive orders, regulations and policies under its jurisdiction. All federal departments and agencies are required to cooperate with and assist the Commission in the performance of these functions under this Executive Order and are required to furnish the Commission with such reports and information as it may require.

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[1] See Appendix C for a reprint of the statutes cited in this report.

If the Commission concludes, after investigation, that reasonable cause exists to believe that a violation of Title VII has occurred, it proceeds to seek a remedy through the process of conciliation.[2] As a result of the 1972 Amendments to Title VII, the Commission, if unable to achieve a remedy by conciliation, may file suit in federal court in order to achieve compliance with the statute.[3] If the case involves a state or local government, the Commission must refer it to the Attorney General who may file suit in federal court.[4] The Commission is also empowered to file suit under the ADEA and the EPA.[5]

The field operations of the EEOC consist of 22 district offices and 26 smaller area offices. District offices are "full service" offices with responsibility for processing individual, class and systemic charges; monitoring the State and Local Program; as well as the Federal EEO and Federal Affirmative Action Programs. The district offices also are staffed with legal units which conduct the litigation activities for the agency.

The EEOC has undergone several major reorganizations since its inception. In 1972, under the Equal Employment Opportunity Act of 1972, the EEOC was empowered to conduct litigation to enforce Title VII and to combat systemic discrimination.[6] In 1977, the agency was reorganized to address major management problems, including large case backlogs, with an average charge processing time of two years, and an ineffective systemic case investigation and litigation program. In response to these problems, the EEOC, under Chair Eleanor Holmes Norton, upgraded the intake charge processing system and introduced the rapid charge processing system. The latter emphasized the negotiation of settlements and used face-to-face fact-finding conferences to achieve this goal. If settlement was impossible or inappropriate, the charge was investigated further by the extended charge processing unit.

Under Chair Norton, the EEOC also established the systemic charge processing system to initiate broad-based actions against discriminatory employment patterns and practices in order to produce benefits for women and minorities on a large scale. These systemic units were established in field offices to bring charges against employers in the area covered by that office. In headquarters, an Office of Systemic Programs was also established to bring charges, give technical assistance to field systemic units and to give focus to the Commission's systemic efforts.

When Clarence Thomas, the current Chairman of the Commission, joined the agency in 1982, he instituted major policy changes. Under Thomas, this Commission has attempted to implement, by promulgating regulations or by initiating practices, policies which question fundamental and well-established theories of discrimination as well as the longstanding approaches to remedying it. Essen-

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[2] *See* The Civil Rights Act of 1964, *as amended*, 42 U.S.C. Sec. 2000e-5(b)(1982) (Title VII). *See also* The Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. Sec. 626(d)(1982) (ADEA).

[3] *See* 42 U.S.C. Sec. 2000e-5(f).

[4] *Id.*

[5] *See* The Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. Sec. 626 (1982) (ADEA); The Equal Pay Act of 1963 (of) The Fair Labor Standards Act of 1938, *as amended*, 29 U.S.C. Sec. 216 and 217 (EPA) (1982).

[6] *See* 42 U.S.C. Sec. 2000e-5(f).

tially, the Commission has questioned the adverse impact theory to prove discrimination, which was enunciated by the U.S. Supreme Court in *Griggs* v. *Duke Power,* 401 U.S. 424 (1971), and which underlies the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Section 1607 (1985), as well as the entire systemic program.[7] In 1984 and 1985 this Commission also announced that it had changed its enforcement policy, emphasizing litigation where a finding of reasonable cause has been made and seeking "full make-whole relief" to identified victims of discrimination.[8]

In 1984, the Commission implemented another reorganization involving a major reshuffling of enforcement staff. This reorganization established a three-tier field structure consisting of 22 district offices, 17 upgraded area offices and 9 local offices.[9] In order to address the staffing and workload imbalances identified by the agency, 150 employees were downgraded. Seventy-eight (78) of the downgraded employees were professionals and 72 were support staff.[10] In addition to the loss of nearly 600 positions which the agency suffered between 1980 and 1983, and the constant freezes in hiring and promotions, these reductions-in-force exacerbated critical staffing shortages and compounded the low morale and attrition at the Commission. As will be discussed below, the 1984 reorganization also resulted in major policy shifts away from negotiated settlements and toward an increased emphasis on expanded investigations and on litigation of all cases in which "cause" is found.

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[7] *See* discussion in section III D below.

[8] *See* discussion in sections III A and B below.

[9] *See* EEOC, "EEOC Approves New Service Office Level To Strengthen Enforcement" (news release) (February 7, 1984).

[10] Letter of Clarence Thomas, Chairman, EEOC, to Ms. Susan G. McGuire, Staff Director, Subcommittee on Employment Opportunities (attachment) (August 20, 1984).

III. IMPLEMENTATION AND IMPACT OF RECENT POLICIES

A. EEOC's New Enforcement Policy (February 5, 1985)

BACKGROUND

At a hearing before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, EEOC Commissioner Fred W. Alvarez testified that:

> The Commission believes . . . that the Equal Employment Opportunity Commission is a law enforcement agency. The Commission believes that an effective law enforcement agency must do at least three things well: first of all, it must make decisions which are as accurate as possible on charges filed before it before alleging a violation of one of the laws which the agency enforces; second, it must be predictable about bringing enforcement actions when violations of these laws are found; and third, it must seek the fullest relief available on behalf of those who were harmed by the violation of the law involved.[11]

In furtherance of this new policy, the EEOC issued a *Statement of Enforcement Policy* on September 11, 1984 and a *Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination* on February 5, 1985.

In the *Statement of Enforcement Policy,* the Commission announced that it would henceforth require that "every case in which the district director has found that one of our statutes has been violated should be submitted to the Commission for litigation consideration if attempts at conciliation fail." The Commission will therefore review for litigation consideration all reasonable cause determinations and all letters of violation where conciliation has failed. Moreover, one finding of discrimination will be deemed no more "worthy" of litigation than any other. The overall goal, as articulated by the Commission, is to be "certainty and predictability of enforcement."

Under this new policy, the advice of the legal staff is sought during the investigative process for all cases. Moreover, before issuing a reasonable cause determination, the district director must obtain from the regional attorney an analysis of whether the evidence supports a finding of reasonable cause. This analysis must be based on a standard which establishes that "it is *more likely than not* that the charging party(ies) and/or members of a class were discriminated against because of a basis prohibited by the statutes

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[11] The Equal Employment Opportunity Commission's Enforcement Policies: Hearing Before the Subcomm. on Employment Opportunities of the Committee on Education and Labor, 99th Cong., 1st Sess. (1985) (Statement of Fred W. Alvarez, Commissioner, EEOC).

enforced by the Equal Employment Opportunity Commission." [12] The likelihood of discrimination is weighed by evidence that establishes a *prima facie* case. If the respondent (employer) provides a viable defense, evidence of pretext should also be assessed.

If the regional attorney concludes that the evidence does not support a reasonable cause finding or letter of violation, a negative Presentation Memorandum is presented to the district director and this document will be forwarded to the Office of General Counsel for review following failure of conciliation.[13]

ANALYSIS

When asked about the implications of the enforcement policy, district office legal staff predicted that there will be an increase in attorney workload. They further indicated that increased enforcement activity will be hampered by insufficient resources and inexperienced legal support staff. In Chicago, an attorney projected that the workload would increase by 50% or more as a result of the new policy. This increase, coupled with the lack of clerical support staff experienced in producing legal-quality work, insufficient funding for depositions and expert witnesses, and inadequate resources, will result in a severely burdened and ineffective litigation effort in the near future. It was emphasized, however, that attorneys were not unwilling to handle the potentially increased workload. However, they stressed that the increased work must be supplemented with increased staff and legal support.[14]

Both legal and compliance staff commented that the merits of the new enforcement policy were that more time would be spent on investigations and the legal and compliance staff would be compelled to work more closely together at an earlier stage in the enforcement process. One person also noted that the policy may lead to more "good faith" conciliations. Another suggested that the enforcement policy may lead to more settlements.[15]

Regional attorneys are required to recommend 24 cases per year to the Commission for litigation. This is imposed upon all district offices without regard to the number of incoming charges, the size of the staff, or the size of the minority populations in which the district offices are located. While some regional attorneys stated that they could easily comply with the 24-case litigation quota, attorneys in smaller offices were not as confident. Moreover, it was reported that in one district office, the pressure which the resulting enforcement policy has allegedly produced has caused some cases to be recommended for litigation "no matter how weak" the facts were. In this district office, cases having little or no merit are therefore being recommended for litigation. In addition, field staff commented that some cases recommended to headquarters for litigation are being rejected and returned to the district offices with little guidance from the Commission or the Office of the General Counsel as to the reasons why they were rejected.

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[12] *See Statement of Enforcement Policy* 3. *See* Appendix F for a reprint of this policy statement.

[13] *See* 2 *EEOC Compl. Man.* (BNA), General Counsel Manual, 1110:0016 (July, 1980).

[14] *See* discussion of legal units in Section VI below, Table 3A.

[15] In fact, this policy may have resulted in fewer settlements. *See* Appendix K, Table 3A.

District office staff also suggested that the enforcement policy has had or will have a negative impact on the number of "cause" findings. One attorney candidly stated that the enforcement policy's assurance of increased litigation has resulted in staff decisions which have the effect of "heading off" borderline "cause cases" by disposing of charges as "no cause" or by settling them cheaply. Since "cause" determinations are given closer scrutiny by upper level management, staff, fearing a reversal of their recommendations, are reportedly less likely to find cause, particularly when the allegation of discrimination cannot be clearly supported. Moreover, the increased involvement of legal staff which, in some offices, appear to have a veto power over the disposition of cases, has, according to some staff persons, resulted in "attorneys' rejecting cases out of hand" irrespective of compliance staff views of the merits, particularly if the facts are not clearly compelling. One reason for this apparent attempt to control the number of "cause" findings may be the lack of adequate legal support which prohibits legal staff from effectively litigating the cases which, if approved, would inevitably be returned to them for action.

B. Policy on Remedies and Relief

BACKGROUND

The *Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination*, another component of the new enforcement effort, announces that the Commission will, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission decisions or orders, seek to obtain full remedial, corrective and preventive relief.[16]

Among the remedies which should be sought in "appropriate circumstances" are:

(1) a requirement that all employees of respondent employers be notified of their right to be free from unlawful discrimination;

(2) a requirement that corrective, curative or preventive action be taken to ensure that similar found or conciliated violations of the law will not recur;

(3) a requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) a requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) a requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial "elements" include:

(1) a notice requirement which the respondent signs and posts at the workplace, and which indicates that the notice is being posted as part of the agreed or ordered remedy; that fed-

[16] *See* Appendix F for a reprint of this policy statement.

eral law prohibits discrimination on the basis of race, color, religion, sex or national origin (or handicap, in the case of federal employees); that the employer will comply with federal law and will not retaliate against employees exercising their rights under law; that respondent will not engage in the conduct which was the subject of Commission action; and that she or he will take the remedial action required by the conciliation agreement, Commission, or court order; [17]

(2) corrective, curative or preventive measures, including changing discriminatory policies, removing the discriminatee from the perpetrator of the discriminatory conduct; and expunging adverse materials in the charging party's employment files;

(3) non-discriminatory placement, a remedial measure which is available to identified victims and requires an "immediate and unconditional offer of placement" in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of the respondent's employees;

(4) back pay, a remedial policy which provides that each identified victim of discrimination is entitled to back pay; and

(5) cessation provisions in which respondents must agree or be ordered to cease from engaging in the unlawful employment practices complained of.

ANALYSIS

When district office staff were asked about the implications of the Commission's remedies policy for the case processing and litigation activities, it was clear that there was confusion concerning the interpretation of the Commission's policy, particularly with regard to the Commission's definition of full relief and the amount of discretion permissible in seeking full relief. While many staff interpreted the policy statement and the subsequent clarifying memorandum of October 15, 1985, as permitting the policy's requirements (*e.g.*, posting or "bumping") [18] to be applied on a case-by-case basis, a significant minority implied that there was little flexibility or discretion permitted by the policy and that the "make-whole" relief required had to be attained in all cases. As to whether this remedies policy applies to class actions, most responded that the policy statement applies only to "individual" cases.

Staff persons in most of the district offices visited expressed concern that the new remedies policy implied that full relief had not been sought previously. They contended that such relief was indeed sought. Others commented that before the new policy was issued, staff would seek "as much [relief] as [they] could." Still others stated that with the exception of the posting requirement, which was new, they are "still seeking whatever [relief they] can get."

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[17] This is known as the "posting" requirement.

[18] "Bumping" refers to the act of removing an incumbent employee from a position or job and replacing that person with one who, but for the act of discrimination, would have initially held that position.

While it is too early to estimate the actual impact of the remedies policy, several district directors and staff members predicted that the new remedies policy would not inhibit settlements between charging parties and respondents. Moreover, one regional attorney suggested that the remedies policy would make employers "take EEOC more seriously" and that the policy would encourage creativity.

Others were concerned about the impact of the remedies policy on the willingness of employers to settle and suggested that the current policy may contravene Title VII's encouragement of conciliations. Examples were given demonstrating employers' resistance to the posting requirement and an overall unwillingness to discuss settlement in light of their expenditures for legal fees made during the course of the "fuller" investigation. It was explained that the more the respondent paid in legal fees, the less willing the respondent would be to effect a settlement prior to the litigation stage. Committee staff were also informed that in the Chicago District Office, the number of conciliations attained dropped 50 percent as a result of the new policy. The latter observation may be supported by the recent statistics: in fiscal year 1985, only 14.4 percent of the charges processed were settled; by contrast, in 1982, settlements accounted for 29.4 percent of all case closures.[19]

The posting requirement was criticized by some staff on the grounds that an employer's posting the required notice would be tantamount to admitting guilt. Staff predicted that employers would therefore resist complying with this aspect of the remedies policy because they would not want to "confess" to having violated the law. Some argued that this requirement also threatened or breached a charging party's right to confidentiality. Others stated that posting, as well as the other requirements under the remedies policy, had worked successfully, especially in sexual harassment cases.

One prominent defense attorney in the Los Angeles area stated that since this policy was enunciated, conciliations between her clients and the EEOC Equal Opportunity Specialists (EOSs) have failed because of the EOSs' insistence that the charging parties obtain "full relief," even if, in the opinion of this lawyer, such relief was impossible to provide. While this effort by the district office staff may be commendable, if not required by the new policy statement, it may be in conflict with Title VII of the Civil Rights Act of 1964, which encourages conciliations.[20] Moreover, this policy may be a total bar to conciliations and settlements since, in addition to refusing to voluntarily concede guilt, most employers, where full relief is required, will always litigate the eligibility of each alleged "identified" victim to receive such relief. Thus, the policy may ultimately encourage protracted and costly litigation and may be wholly impractical given the Commission's limited resources.

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[19] *See* Appendix K, Table 3A. One district director explained that the decrease in settlements occurred because, previously, EEOC would settle for whatever was acceptable to the charging party. Under the current policy, EEOC will reportedly seek all available relief. Query, however, whether the interest of the charging party is now superceded by the enunciated prosecutorial objectives of EEOC.

[20] *See* 42 U.S.C. Sec. 2000e-5(a).

C. Affirmative Action/Goals and Timetables

BACKGROUND

In the EEOC's 1985 submission to the Office of Management and Budget (OMB) for inclusion in the *Regulatory Program of the United States Government,* Chairman Clarence Thomas expressed his views on the issue of goals and timetables, historically used to remedy the effects of employment discrimination:

> [T]he federal enforcement agencies, including the EEOC and the Departments of Justice and Labor, turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables, and by using rigid statistical rules to define discrimination without regard to the plain meaning of that term. . . . As Chairman of the EEOC, I hope to reverse this fundamentally flawed approach to enforcement of the anti-discrimination statutes.[21]

ANALYSIS

It is clear from responses to Committee staff's inquiries regarding the Commission's policy, that despite the absence of Commission action in promulgating a clear policy, goals and timetables are no longer encouraged or permitted to be used as a remedy to employment discrimination.

District office staff were informed by various means concerning the Commission's views on the subject of goals and timetables. Regional attorneys learned of this policy during attendance at a meeting in the fall of 1985, at which the Acting General Counsel, Johnny J. Butler, informed them not to include goals and timetables in proposals for settlement or in actions in which the EEOC served as intervenor. Other staff were informed by an EEOC Commissioner that goals and timetables were "dead".

Those who did not hear of the new policy from headquarters' sources surmised or concluded from news reports concerning the Justice Department's litigation efforts to overturn the court-imposed numerical remedies in employment discrimination cases that one was not to "talk" about, much less propose, the use of goals and timetables as a form of relief.

The Commission's apparent policy regarding goals was communicated as well by indirect headquarters' actions. For example, proposed settlements were returned to the originating district offices without any specific guidance as to which segments were offensive and to be removed. Headquarters staff would thereafter subtly communicate that the questionable and, hence, offensive portions were those containing impermissible goals and timetables. In St. Louis, staff were compelled to return to the respondent after a settlement agreement containing goals had been reached to inquire whether the respondent would agree to remove the section of the agreement containing the goals.

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[21] Office of Management and Budget, *Regulatory Program of the United States Government,* 523 (February 1985). *See* Appendix E for a reprint of this document.

In addition to proscribing the use of goals and timetables, legal staff were informed that, in the event that employers insisted on retaining their existing affirmative action plans which contain goals and timetables, EEOC lawyers were to insist on language which would be included in consent decrees, and which would state that the EEOC would not participate in the enforcement of these goals and timetables. An example of such action by the EEOC is *June Meyer et al.* v. *MacMillan Publishing Co.,* 78 Civ. 2133 (MEL) (S.D.N.Y.), in which EEOC signed a proposed consent decree which contained the following language:

> The EEOC takes no position with regard to Section VII of this Decree pertaining to goals, and will not participate in its enforcement.[22]

Committee staff later learned that the Acting General Counsel has also instructed the legal staff not to seek the enforcement of goals and timetables in existing consent decrees as well as in future ones. This information was later confirmed by Johnny J. Butler, the Acting General Counsel, at a hearing before the Subcommittee on Employment Opportunities on March 11, 1986.

Mr. Butler's directive was made in the absence of a Commission vote or other enunciated change in policy. Thus, his actions arguably constitute an abuse of his prosecutorial authority under Section 705 of Title VII of the Civil Rights Act.[23] Nor was there any effort of the Acting General Counsel or the Chairman of the Commission, who indicated his support for this directive in a letter sent to Members of Congress on January 31, 1986, to comply with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. Section 551(4) (1982), to the extent that this directive constitutes a "rule," as defined by the APA to include any "agency statement of general or particular applicability and future effect designed to implement . . . law or policy. . . ." [24]

It should be noted that the Commission's action on this issue contradicts its current Affirmative Action Guidelines, 29 C.F.R. Sec. 1608.4(c)(1) (1985), which permit the use of goals and timetables by employers. Moreover, the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Sec. 1607.13 and 1607.17 (1985), also contain comparable language relating to appropriate affirmative action. Neither of these guidelines have been rescinded by action of the Commission. This position also flies in the face of previous EEOC pronouncements in support of goals and timetables. *See* Speech Given by Clarence Thomas Before the National Conference on Equal Employment Opportunity in the Federal Sector, 12 (October 1, 1982), at which Chairman Thomas stated: "[S]ince the advent of authoritative Supreme Court decisions such as *Steelworkers* v.

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[22] *Consent Decree in Full Settlement of Civil Action* (proposed) 3 (December 12, 1985). See Appendix I for a reprint of this consent decree.

[23] *See e.g.,* Equal Employment Opportunity Commission's Policies Regarding Goals and Timetables in Litigation Remedies: Hearing Before the Subcomm. on Employment Opportunities, Committee on Education and Labor, 99th Cong. 2d Sess. (1986) (Statement of Eleanor Holmes Norton, Professor of Law, Georgetown University; Statement of Leroy Clark, Former General Counsel, EEOC; Statement of William Robinson, Executive Director, Lawyers' Committee for Civil Rights Under Law).

[24] *See* Congressional Research Service, the Library of Congress, *Legal Implications of EEOC General Counsel's Directive to Regional Attorneys Concerning Minority Goals and Timetables,* CRS-10 (1986).

Weber, 443 U.S. 193 (1979) and *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980), which upheld the legality of the 10% minority set aside program, it is settled that, as a matter of law, affirmative action—including the use of numerical goals—may be used in appropriate circumstances." *See also Williams* v. *City of New Orleans,* 729 F. 2d 1554 (5th Cir. 1984) in which Judge Wisdom, in his dissenting opinion, referred to the Commission's brief in this case. *See* 729 F. 2d 1554, 1572 n. 5. Moreover, this action ignores the fact that every U.S. Court of Appeals which has addressed the validity of numerical remedies after *Firefighters Local Union No. 1784* v. *Stotts,* 467 U.S. 561, 104 S. Ct. 2576 (1984), has upheld such affirmative action remedies.[25]

As to the potential impact of the Commission's apparent policy regarding goals and timetables, a staff person in the New York District Office commented that eliminating goals and timetables as a remedy is like "sending soldiers to the field with guns and without bullets." Many stated that goals and timetables have been an effective means of measuring compliance and have facilitated the monitoring of settlements, consent decrees and court orders.

Employers have also accepted and endorsed the use of goals as a tool with which to monitor their compliance. One district director noted that goals have not been abused and that the district office in question had emphasized to employers that goals were to be used and *not* quotas, based on availability and affirmative recruitment efforts. If an employer failed to reach the goal, but used a good faith effort, it was not penalized. Without goals and timetables, there would be an increased burden on charging parties and community and civil rights groups to monitor the employer's performance.

D. Class Actions and Individual Victims Policies

BACKGROUND

Chairman Thomas, as previously noted, has expressed his objections to the use of statistics in establishing liability in employment discrimination cases. In the EEOC's submission to the Administration's *Regulatory Program of the United States Government,* he argues: "[T]he EEOC . . . turned the statutes on their heads by using rigid statistical rules to define discrimination . . . ." Thomas goes on to oppose the use of statistics in his proposal to revise the Uniform Guidelines on Employee Selection Procedures (UGESP):

> The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of differ-

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[25] *See Commonwealth of Pennsylvania* v. *Local Union 542,* 770 F. 2d 1068 (3d Cir. 1985); *Paradise* v. *Prescott,* 767 F. 2d 1514 (11th Cir. 1985); *petit. for cert. filed,* 54 U.S.L.W. 3424 (Dec. 10, (1985) (No. 85-999); *Deveraux* v. *Geary,* 765 F. 2d 268 (1st Cir. 1985), *petit. for cert. filed,* 54 U.S.L.W. 3229 (Sept. 19, 1985) (No. 85-492); *Turner* v. *Orr,* 759 F. 2d 817 (11th Cir. 1985), *petit. for cert. filed,* 54 U.S.L.W. 3086 (July 31, 1985) (No. 85-177); *Vanguards of Cleveland* v. *City of Cleveland,* 753 F. 2d 479 (6th Cir. 1985), *cert. granted,* 106 S. Ct. 59, (Oct. 8, 1985) (No. 84-1999); *EEOC* v. *Local 638,* 753 F. 2d 1172 (2d Cir. 1985), *cert. granted,* 106 S. Ct. 58 (Oct. 8, 1985) (No. 84-1656); *Van Aken* v. *Young,* 750 F. 2d 43 (6th Cir. 1984); *Wygant* v. *Jackson Board of Education,* 746 F. 2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985) (No. 84-1390); *Kromnick* v. *School Dist. of Philadelphia,* 739 F. 2d 894 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 782 (1984) (No. 84-606).

> ent races, sexes, or national origins who are hired or promoted by that employer . . . . UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standard as other people even if those standards are race—and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination".[26]

The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Sec. 2607.1 (1985), were promulgated in 1978 and jointly adopted by the EEOC, the Civil Service Commission, and the Departments of Labor, the Treasury, and Justice to provide a single set of principles to assist employers to comply with the federal anti-discrimination law. They were designed to provide a framework for determining the proper use of tests and other selection procedures.

The rule which underlies the Uniform Guidelines on Employee Selection Procedures (UGESP) was enumerated by the U.S. Supreme Court in the landmark, unanimous decision of *Griggs* v. *Duke Power*, 401 U.S. 424 (1971). In *Griggs*, the Court held that an employer could not impose requirements which had an "adverse or disparate impact" unless they were job-related. The employer's subjective "good faith" was not relevant. "Business necessity," an objective measurement, is what the employer had to establish. Therefore, if tests and other "neutral" methods of selecting potential employees have an adverse effect upon the numbers of women and minorities employed, these tests must be validated to show that they are job-related.[27] The *Griggs* decision was based on the Civil Rights Act of 1964 and remains the law of the land with or without the existence of the Uniform Guidelines.

On March 15, 1983, the EEOC voted to review the recordkeeping provisions of UGESP.[28] In June of 1984, the Commission voted to have the Commission's Office of Legal Counsel prepare a notice of proposed rulemaking for the purpose of clarifying the current UGESP recordkeeping requirements.[29] At that time, the Commission also voted to announce hearings regarding the recordkeeping changes, as required by Section 709(c) of Title VII of the Civil Rights Act of 1964, *as amended*. The EEOC also voted to invite public comment as to whether or not proposed changes in the recordkeeping requirements would effectuate the purposes of Title VII.

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[26] *But see* 2 *EEOC Compl. Man.*, (BNA) 633:0008 (July 1984), which cites, with approval, *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324 (1977):

[s]tatistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination.

[27] *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

[28] *See* EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures: Hearing Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor, 99th Cong., 1st Sess. (1985) (Statement of Clarence Thomas, Chairman, Equal Employment Opportunity Commission).

[29] *See id.*

On July 31, 1984, the Commission voted to review UGESP in its entirety.[30] At the conclusion of this review, Chairman Thomas wrote that he would propose to the Commission and to the co-signatory agencies a revision of UGESP "that will recognize that statistical disparities are not tantamount to discrimination and that minorities and women are fully capable of competing on the bases of race- and sex-neutral standards".[31]

In 1985, Chairman Thomas directed the Office of Legal Counsel to conduct a review of UGESP, examining its history and evolution, any relevant case law, the scope and methodology; providing an analysis of the law regarding adverse impact; and making recommendations as to whether and how UGESP should, if necessary, be revised.[32] The staff document was presented to Chairman Thomas in July 1985, but was rejected on the grounds that it did not adequately set forth the analysis which he was seeking.[33] An outside consultant was then asked to conduct this analysis. To date, this review has, reportedly, been completed but has not been presented to the other commissioners or divulged by the Chairman.

The EEOC has been severely criticized for conducting its review of UGESP in secrecy.[34] This alleged practice differs from the previous instances in which UGESP development was conducted openly by the several agencies which publicized their drafts and permitted various interested groups, including employers, the psychological profession, and civil rights groups, to comment and make recommendations for its improvement.

ANALYSIS

Since the UGESP are under review, all cases involving these guidelines are treated as "Non-Commission Decision Precedent" (Non-CDP) and cases and findings of violations based on UGESP must therefore, be approved by headquarters.[35]

Based upon the Chairman's pronouncements on the use of statistics to prove discrimination, some district office staff were clearly confused and stated that they were receiving "conflicting signals" from headquarters. Others concluded that headquarters "frowned" on disparate impact cases and that headquarters would either reject or "sit" on them. Examples were given of cases in which district office legal staff were told to remove allegations of disparate impact or to use standards such as "disproportionate exclusion" instead. What this latter standard actually means is not clear.

Thus, according to most staff persons interviewed, cases which do not identify specific, named victims of discrimination are clearly not acceptable. Even the systemic program, in which charges

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[30] *See id.*

[31] *See Regulatory Program of the United States Government, supra, at 523.*

[32] *See* EEOC's Proposed Modifications of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures: Hearing Before the Subcomm. On Employment Opportunities, Comm. on Education and Labor, 99th Cong., 1st Sess. (1985) (Statement of Clarence Thomas, Chairman of the Equal Employment Opportunity Commission).

[33] *See id.* (Statement of William L. Robinson and Richard T. Seymour for the Lawyers' Committee for Civil Rights Under Law).

[34] *See, e.g.*, Hearing, *supra*,

[35] The term "Non-Commission Decision Precedent" refers to charges in which the Commission has not established or is in the process of establishing Commission precedent. These charges must be sent to headquarters for consideration by the Commission. *See* 2 *EEOC Compl. Man., supra*, at Sec. 604.7(a).

brought by the Commission were traditionally based upon statistical evidence of possible discrimination and which operated from the premise that discrimination affected classes and not merely individuals, must now base its investigations upon established harm to actual "victims" and not solely upon the statistical evidence of such harm or of the presence of harmful practices. While district directors said that in previous cases they had sought individual victims in order to substantiate their class action cases, this current policy apparently requires an identification of many (if not most) members of the class, particularly if remedies are to be sought only for "identified victims" of discrimination.

As stated above, relief sought for discriminatees is apparently limited to the identified victims of discrimination, no matter how large the class of "non-identified victims" may be. The effect of this limited remedies policy may be to preclude many, if not most of a class of discriminatees, from obtaining relief, particularly when it is impossible to identify all of the individuals who would have been hired or promoted in the absence of the unlawful discrimination.[36]

Recent EEOC statistics appear to confirm this conclusion. According to a report by Women Employed Institute, a Chicago-based women's advocacy organization, in the first half of 1985, only 2,964 victims of discrimination received monetary benefits through charges filed with the agency. In 1980, 15,328 persons received such benefits.[37]

District office staff suggested that the Commission's policy regarding individual victims will have the greatest impact on the systemic units which investigate pattern and practice cases involving large employers. Systemic units are now compelled to identify "victims" during the course of the investigation or before a charge of discrimination is issued by the Commission. Thus, before the systemic units can investigate a charge, they must unearth the discriminatees. It is extremely difficult to unearth them, however, without first conducting an investigation. The burden on the systemic units is doubly difficult because they may be faced with hundreds of potential "victims" which they have to locate and interview.

This policy, therefore, severely taxes the resources of the systemic units. In one case, for example, there were 5,000 potential discriminatees. In order to manage this large number, the unit had to develop a computer program. It took four months in order to receive the approved funds to "run" the program. The task of identifying victims is especially difficult when an employer is uncoopera-

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[36] For this reason, the Fifth Circuit Court of Appeals in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 262 (1974) ruled that:

> The key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly. For instance in this case, actually to assume that employee #242 would have been promoted in three years to such-and-such job instead of employee #354 is so speculative as unfairly to penalize employee #354.

To avoid this result, courts have used a "classwide" approach in which all members of groups affected by the discriminatory practice are presumptively entitled to relief of some sort, typically prospective in nature. The EEOC's current policy flies in the face of this longstanding practice and the unrebutted logic on which it is based.

[37] Women Employed Institute, *Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration*, 17 (1986) (*Citing* EEOC District Office Summary Reports. *See* Appendix K, Table 5C.)

tive and will not supply data regarding his or her workforce, particularly at the pre-investigative stage.

The burdens confronting the systemic units have been compounded due to headquarters' changing to this "identified victims policy" and imposing it upon current cases. In St. Louis, for example, the employer had submitted, albeit grudgingly, the required data and was, years later, compelled to submit additional information in order to identify victims. Such practices cause embarassment to district office staff and bitterness on the part of the employer.

IV. CHARGE PROCESSING

A. Intake Units

BACKGROUND

The intake unit is the first contact most of the public has with the Equal Employment Opportunity Commission. The Commission, which has the responsibility for administering Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Equal Pay Act, requires the intake Equal Opportunity Specialists (EOSs) to be knowledgeable about these statutes, the fact situations which constitute a violation of them, and the legal proof needed to substantiate such a violation in order to properly analyze charges and inform the public of its rights in discrimination cases. Thus, intake EOSs have one of the most important jobs in the Commission. Their understanding, or lack of understanding, of the law and EEOC procedures, affects the way the public views the EEOC in general, and the EEOC complaint processing system in particular.

The intake EOS's initial interview of the charging party is crucial to the investigation process. First, by asking the right questions and extracting the necessary information, the EOS can guarantee that charges will move more quickly from intake to one of the processing units and less time will thereafter be spent reinterviewing the charging party for needed information. Secondly, an EOS must be able to offer effective pre-charge counseling. This requires an extensive knowledge of EEO and related laws to properly inform charging parties about their rights. It also requires an ability to deal effectively with charging parties who are often emotionally distraught or angry. Thirdly, post-charge counseling is one of the most important responsibilities of the intake EOS. It requires extensive knowledge of all three statutes, the ability to judge the potential merits of a charge and advise a charging party of his or her options without denying the right to file a charge. Fourth, an intake EOS must be able to inform the charging party of what to expect next. This information requires knowledge and the ability to effectively explain both the rapid charge processing and extended charge processing procedures as well as the procedure for final disposition of the charge.[38]

ANALYSIS

The Committee staff found, in most cases, that once an EOS has effectively completed these steps with a charging party, the charges are perfected in intake and assigned to a processing unit within 48 hours. In the six offices visited, the staff discovered that

[38] *See* 1 *EEOC Compl. Man., supra*, Section 2 (1984).

often intake EOSs were involved in the initial recommendation of charge assignment, either to the rapid charge processing unit or to the extended charge processing unit, and in identifying possible early litigation and class action charges.

Although staff in every office visited and every unit in each office stated that intake EOSs have one of the most important—and many believe the most important—positions in the district office, the Office of Personnel Management (OPM), and the Commission, during the 1984 reorganization, downgraded intake EOSs from GS–11s to GS–5s, GS–7s, and GS–9s. Intake supervisors were downgraded from GS–13s to GS–11s. This downgrading has had repercussions throughout all of the district offices visited.

While seasoned investigative staff served as intake EOSs before the most recent reorganization, new employees with little or no experience or investigative training now have taken their places. These new EOSs many times use the intake unit as a stepping stone to better paying jobs within the Commission and typically do not remain in the position long enough to learn it. For example, a GS–9 EOS will often opt for a higher paying position in a processing unit where the chance for advancement is greater. Of the offices visited, the Houston District Office has lost nine employees in the last 15 months from the intake unit, while the St. Louis Office is functioning with only three intake EOSs on staff.

The majority view of the district office staff is that this constant change in intake EOSs has affected the quality of work produced by the EOSs and the quality of information and performance made available to the public. Investigators in the processing units complained that they often have to reinterview the charging parties because of the poor quality of the case file assembled by the intake EOSs. One employee in the Birmingham office, which has recently experienced a decrease in the number of charges filed, stated that while the quality of charges received from intake are adequate, these relatively new intake EOSs may give the impression to the public that the EEOC intake staff is inexperienced, thereby discouraging potential charging parties who fear that their charges will be improperly handled.

Investigators and attorneys in the field offices visited stated that adequate, efficient and uniform training may be a primary factor in the effectiveness and skill of new intake EOSs. Unfortunately, this training was not apparent in the district offices visited. Although the Commission has promised to deliver video-cassettes for intake training, they have not been received to date, and district offices have had to rely on their own budgets and expertise for appropriate on-the-job training.

Most district offices' training budgets are extremely limited, ostensibly because the EEOC requires that all new unit supervisors must have 40 hours of supervisory training in their first year and a total of 80 hours by the end of their second year. Funds are therefore spent on their travel and expenses rather than for new intake EOS training.

With a lack of money, district offices must focus their training programs on in-house ability. Many times this training may last only a few weeks, with the trainee acquiring most of his or her expertise and knowledge from day-to-day observation. While this is

an appropriate and necessary experience, it needs to be supplemented with formalized training, whether classroom, assigned reading or group discussions.

The different district offices seem to respond to the training of new intake EOSs as the need arises rather than having an ongoing, prepared program. In Houston, the district office is trying to remedy this problem and has assembled an Intake Training Committee to develop an in-house program to include training on the three statutes, how to process charges, and EEOC procedures. The training package may include printed materials and video tapings of discussions regarding jurisdiction, *prima facie* cases and other pertinent topics.

While some emphasis is placed on training new EOSs, the district offices reviewed did not seem to have any established program for up-to-date training for experienced EOSs. The continued training of all EOSs, even those in the processing units, is viewed as necessary because, according to field office staff, many times EOSs in the rapid and extended units are called to the intake unit to assist in taking charges because of lack of available intake staff.

Most of the district offices revealed that they must rely on other units to assist in handling the intake overflow. The extent of the reliance on other units varies in each district office. Usually the number of intake EOSs on staff reflects the need for additional assistance. The St. Louis office is functioning with only three EOSs, one supervisor and two clericals while the Chicago District Office has two separate intake units consisting of four EOSs, one supervisor, two Equal Opportunity Assistants (EOAs) and three clericals each.

Staff in one district office reported that it is not uncommon for a charging party to wait two hours to be seen and another 1½ hours to have his or her charge form typed because there is such a shortage of EOSs and clericals. This same district office has been informed that its FTE level will be cut this year. The district director believes that some of those cuts will have to be made in the intake unit.

Due to an overall staff shortage, intake EOSs in New York are being required to perform not only intake work but also substantial weight and certified reviews [39] for the Commission's state and local program. In this district office, an intake EOS must be performing these quality reviews to become a GS–9, the highest possible GS-level for an intake EOS. Thus, the already overburdened intake EOSs are being assigned their GS-level based on other unit work, instead of based solely on their performance of the intake function. In other district offices, the state and local coordinator or the GS–5 or GS–6 EOAs perform this review function.

The district office attorneys are also being affected by the staff shortages and lack of expertise in intake. Each district office has some type of "Attorney of the Day" policy, where an attorney is assigned to intake on a weekly or daily basis. These attorneys must make themselves available to intake EOSs to answer legal and technical questions raised by the day's various charges. This can

[39] *See* Section IV C below for a discussion of the substantial weight and certified review process.

sometimes require that the attorney sit in on the charge-taking process, which can absorb as much as two hours of his or her own work-time.[40]

According to field staff, low morale among intake EOSs leads to high turnover, causing a lack of necessary continuity in intake and lack of knowledge of intake EOSs. Moreover, in addition to problems already cited, intake EOSs are reportedly underpaid compared with EOSs in other units and with similarly-situated persons in the private sector. In Birmingham, the large majority of the intake EOSs, all with college degrees, were GS–5s, the lowest-paid grade level for EOSs, since they were hired in October 1984.

Morale is also being affected by the intake unit's General Performance Appraisal and Development System (GPAD).[41] The GPADs for the individual district offices vary. However, basic requirements to "excel" on an intake GPAD include an evaluation of time spent with a charging party and the quality of information acquired from the charging party. One district office expects intake EOSs to meet with a charging party for no more than 15 minutes to establish the legitimacy of a charge and complete the charge process within a hour to "excel" in their GPAD rating. To meet this requirement, EOSs complain that many times, they must cut a charging party short to fully present all relevant evidence. This, according to staff, results in poorly constructed notes and an incomplete case file.

The Commission has begun to recognize some of the current problems in intake which were caused by the 1984 reorganization. The EEOC recently formed an intake task force which circulated a proposal outlining four alternative options to the current intake procedures. Three of the four options require the merging of the current intake units with the various investigative units and would use a rotational system for intake coverage. The other option would continue with the current intake structure but would expand the duties of the intake EOSs. All of these options will require the establishment of a technical information unit which would expand the current records unit.

The intake task force has recommended the installation of two mechanical devices to be used to coincide with these options. These devices, if installed, could greatly assist the intake units in their workload. The first would be a telephone recording device to provide the public with a brief description of what discrimination charges the EEOC handles, the office hours, how to schedule an appointment and information needed to file a charge. The second device, a video-cassette, would be used to similarly brief walk-in inquirers as well as give them information on the EEOC charge processing procedures.

Overall, Committee staff learned that the intake system, as it is organized now, is not functioning efficiently. The heavy turnover of staff, the lack of training, the low GS levels, the low morale, and

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[40] One district director suggested that the intake supervisors be attorneys or have an extensive legal background to alleviate the problem. However, with the restriction of the current GS-11 level for an intake supervisor, it is unlikely that such a professional could be hired at this salary level.

[41] A GPAD is the employee's appraisal developed jointly by the EEOC, the Office of Personnel Management, and the union representing the EEOC employees.

the lack of seasoned employees have had a negative impact on the intake unit, which in turn, has significantly affected the investigation and resolution of complaints. Ultimately, it is the charging parties who suffer under the current structure and policies.

B. Expanded Presence Program

The Expanded Presence Program, established nationwide in fiscal year 1985, was developed to provide educational and intake services, by district office personnel, to persons in outlying communities where no EEOC office exists. The district office staff usually visit selected communities on a monthly basis to conduct intake sessions and bring the charges back to the district office for investigation.

In its first year of existence, 7,013 total inquiries were made agency-wide with 3,520 actual charges filed. Approximately 13,859 staff hours were spent on the program at a cost of $116,488 to administer. The large majority of this, $103,485, was spent on travel and per diem costs. The average cost for each of the 7,013 inquiries was $16.59 and it cost the Commission $33.06 for each charge filed.[42]

The success of this program cannot be effectively judged after only one year of operation and its future achievements will be dependent upon public awareness and response. Before a large increase will be seen in the number of charges filed, the first few years of this program will probably have to be spent educating the public about the presence of the program. One district director credits the low number of charges filed this year to concerns by potential charging parties that once the EEOC staff return to the district office, they (the charging parties) will suffer retaliation by employers.

Distance, cost and time seem to be the major factors preventing aggrieved individuals from seeking redress under the statutes. The Expanded Presence Program was designed to address these access barriers. Each district office has highlighted and identified problem areas within its respective jurisdiction. Of the district offices visited, several were only focusing their programs on one area or city, while one district office had 5 separate cities targeted throughout the state. Two other offices, after reviewing their areas, decided to use the money and time to educate local minority groups about the EEOC rather than travel to other cities. During the staff visits, however, it was discovered that one office was allowed to choose this option but the other was reportedly reprimanded by the Commission for not traveling to the outlying areas.

While, as we note above, it is not possible to draw conclusions as to the success or failure of such a new program, the responsibility of the EEOC to educate and assist those who may be discriminated against is the program's objective. Therefore, even if only one person becomes informed about his or her rights during an area visit, the program could be considered successful. However, the value of the program must be carefully analyzed for cost effective-

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[42] These figures were provided by the Commission's Office of Program Operations subsequent to the Committee site visits.

ness. Moreover, careful attention should also be given to the complaints voiced by district office staff that they cannot handle the charges which they have now and should not be actively soliciting new ones until the backlog of current cases becomes manageable.

C. State and Local Program

BACKGROUND

Charging parties may file complaints directly with the EEOC or with certain State and Local Fair Employment Practices Agencies (FEPAs). These FEP agencies, authorized under Section 706 of Title VII, enter into work-sharing agreements to receive and process charges deferred to them by the EEOC. Essentially, these agreements are contracts which establish charge processing procedures between EEOC and the deferral, or "706 Agency," for which EEOC contributes funds for the FEP agency's operations.

During fiscal year 1985, state and local agencies processing EEO complaints under these work-sharing agreements were funded at $19.5 million (specifically earmarked in the agency's appropriations).[43] Out of a total of 119,695 charges in EEOC's inventory during FY 1985, 47,693 charges, or approximately 40 percent, were received and initially processed by state and local agencies.[44] The majority of the charges remain with the EEOC for processing.

Title VII requires that EEOC accord "substantial weight" reviews of the findings of state and local agencies to determine whether their investigations meet minimum Title VII standards.[45] As this report will address in the following section, these quality reviews, according to some Commission employees, are not being adequately monitored given the apparent lack of staff to perform the state and local function.

ANALYSIS

Five of the six district offices visited had contracts with state and local FEP agencies. Staff interviews of the state and local coordinators in these offices revealed a number of major problems with the current structure and operation of this program.

Under the Commission's 1984 reorganization, the state and local units, then consisting of a supervisor, several equal opportunity specialists and a clerk at every district office having state and local contracts, were abolished. Currently, a single state and local coordinator, reporting directly to a compliance manager, has the overwhelming responsibility of monitoring the contracts (*e.g.*, one office

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[43] Public Law 98-411 authorized funds for the EEOC totalling $160.3 million in fiscal year 1985, including $19.5 million specifically earmarked for state and local grants. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985, Pub. L. No. 98-411, 98 Stat. 1545, 1562 (1984).

[44] *See* EEOC, Office of Program Operations, Annual Report FY 1985, 13. *See Also* Appendix K, Tables 1A, 1B and 9, for statistics on the processing workload of the EEOC and the FEPAs.

[45] *See* 42 U.S.C. Sec. 2000e-5(a) [hereinafter cited as "Section 706," the more commonly-used statutory reference for state and local FEPAs]. "Substantial weight" refers to random reviews of final actions by FEP agencies other than on the merits of the charge itself, such as settlement or dismissal for untimeliness, failure to cooperate or inability to locate the charging party, using Title VII and ADEA charge resolution review procedures contained in EEOC Order 916. A final action which is not accompanied by supporting documentation, or is not supported by the documentation, should be rejected and either returned or corrected by the FEP agency or assigned for further processing by the EEOC.

had 10 contracts with over 7,000 projected charge resolutions), performing "substantial weight" and "certified reviews," and providing technical assistance to the state and local agencies. The responsibility for performing "substantial weight" and "certified reviews" [46] of the FEP agencies' work products (i.e., investigations and resolutions) is shared with the intake unit.[47] However, the intake unit is now staffed by lower-graded and significantly less experienced EOSs who lack investigative backgrounds, knowledge of Title VII and the other statutes enforced by EEOC and related laws, and are ill-trained to perform the state and local function.

The downgrading of the intake units, as pointed out earlier, is having major repercussions throughout the Commission. Over the last several years, however, the number of charges filed with the Commission, which must be developed by the intake units, has been steadily increasing.[48]

Intake staff indicated that there is tremendous pressure on them to produce quality work during the intake process. In addition, the Commission expects them to do quality work reviewing the state and local files. According to intake staff, it would be difficult to do both jobs well without more staff and adequate training. Because of the current intake/state and local structure, as well as the limited resources, the Commission appears to conduct superficial, and not substantial, quality reviews of the work of these state and local agencies.

In practice, "substantial weight" or quality reviews by the Commission typically consist of little more than a cursory review of the state's findings (without a review of the entire case file) or a telephone call to the FEP agency inquiring whether a substantial investigation has been completed. Thus, the importance of this statutory oversight notwithstanding, a perfunctory and inattentive act is all that normally occurs prior to awarding credit to the state or local agency for a charge resolution.

FEP agencies are generally paid approximately $400 for every charge processed under the contracts, irrespective of either the complexity of the charge or the quality of the investigation. Because of the overwhelming task which the state and local coordinator has in processing cases from FEP agencies, that individual typically is unable to visit funded agencies to conduct on-site reviews or to determine the competency of agency staff and quality of its work product. State and local coordinators reported that only about 10 to 30 percent of the state or local agency's findings are routinely reviewed by the EEOC and that there is generally a 95 percent acceptance rate of the charges resolved by the state agencies.[49] This

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[46] 29 C.F.R. Section 1601.75 of EEOC's regulations provide for certification of FEP agencies which have a past, satisfactory performance. EEOC will award contract credit without case-by-case review for final actions on dual-field charges submitted by certified agencies with the exception of those charges listed in Section 4 of EEOC Order 916.

[47] On February 7, 1984, the EEOC approved a major field reorganization, including the merging of the State and local function with the intake unit. *See Notice*, EEOC Office of Congressional Affairs, February 13, 1984. Under that merger, Title VII substantial weight reviews, ADEA contract credit reviews and certification reviews are performed by the combined intake/state and local units. *See* Memorandum of Odessa M. Shannon, Director, Office of Program Operations, to Clarence Thomas, Chairman, *(et al.)* (regarding) Criteria for Designation of Field Offices, at 14-5 (attachment) (January 19, 1984).

[48] *See* Appendix K, Table 1A, for specific data.

[49] *See* Appendix K, Table 10, for specific data on the state and local agencies' program results in the district offices visited.

high acceptance rate is due partly to the fact that a rejection rate over 5 percent counts against a state agency and will require closer scrutiny—a luxury which the EEOC can ill-afford given its current resources—of future work-sharing agreements.

A Commission employee in one of the district offices argued that the current state and local program is tantamount to "ambulance chasing"—that is, the 706 agencies are simply drumming up business in order to be paid for the resolution of the charges. In addition to the specified number of projected charge resolutions under the work-sharing agreements, FEPAs may request from EEOC a modification of their contracts for additional charge resolutions.

The current contractual agreement, with its payment structure, creates a disincentive for the state and local agencies to do thorough investigations or class actions. In one district office, Committee staff also learned that it was not uncommon for Commission employees to take deficient charges processed by the state agencies and include them in EEOC's inventory, replace the deficient charges with new charges, and credit the state and local agencies with the specified number of charge resolutions agreed upon under their contract. An internal audit report of the Chicago office revealed that rather than issuing a "Notice of Right to Sue" [50] in the state and local function, the district office routinely transfers these cases to the rapid units.[51] Due to the subsequent closure actions in the rapid units, therefore, it appears that the intent of this procedure may be to inflate the productivity figures of the rapid charge processing units.

The manner in which state and local agencies are funded clearly needs to be reassessed. Instead of funding these agencies solely on the number of cases resolved, a district office staff person suggested that possible alternatives could include funding based partly on a formula allocation (according to minority population) and partly on discretionary funding for innovative programming (to reward program excellence).

Certain district office staff persons reported that requests for additional staff to perform the state and local function have been denied by headquarters. Under the reorganization of 1984, only the state and local coordinator in each district office is assigned full-time to monitor this program. As currently structured by the EEOC, therefore, the state and local program appears to be poorly managed and severely understaffed.

D. Rapid Charge Processing Units (RCP)

BACKGROUND

Once a charge has been accepted for processing, it is then investigated to determine whether there is reasonable cause to believe that the alleged violation has occurred. The rapid charge processing (RCP) units in the district offices are responsible for investigat-

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[50] Title VII of the Civil Rights Act, 42 U.S.C. Sec. 2000e-5(b) provides the statutory right of charging parties to terminate their involvement in the EEOC's administrative process and to request a "Right to Sue" notice enabling them to file a civil action in a federal district court.

[51] *See* Memorandum from Joseph S. Bennett, Director, Region II Programs, Office of Program Operations, to Kate Blunt, Director, Chicago District Office, (concerning) Program Management and Quality Assurance Reviews of the Chicago District Office (October 29, 1985).

ing and resolving individual or one-on-one charges of discriminatory practices in the workplace. These charges generally require swifter investigations and result in settlements or rapid closures due to successful conciliations or other administrative reasons.

ANALYSIS

Interviews with RCP unit supervisors and numerous investigators in the field offices visited suggest that there is greater emphasis now in the rapid closure of cases to the detriment of the quality of the investigations. For example, Committee staff were told that investigations have to be completed within certain timeframes and that investigators often are unable to fully investigate the allegations because of the tremendous pressure to close cases.

The Commission has been criticized in the past for attempting to eliminate charges, as opposed to eliminating discrimination. During the fiscal year 1976 transitional quarter, for example, EEOC developed and implemented an expedited charge processing procedure known as the "Thirty Day Turn-Around Project" or "TQ Project". The goal of this project was to resolve the older cases in the EEOC inventory and consequently reduce the overall backlogged cases. This was accomplished by streamlining the investigative process, eliminating on-site investigations and rendering "no cause" determinations on "minimally adequate evidence".[52] The Commission discontinued this project after receiving numerous complaints from individuals, civil rights groups, the Congress and others that these expedited charge processing procedures violated the rights of charging parties.

This "push for numbers" and disregard for the merits of the charges is due to several factors. In addition to the problem of severe staff shortages and dwindling clerical support, EEOC field staff emphatically stated that the problem with this emphasis on numbers is due, in large part, to the fact that the appropriations and oversight committees of the U.S. Congress consistently demand numbers from the head of the EEOC when justifying the Commission's budget or assessing its performance during hearings. What becomes prominant during these congressional hearings, they stated, often are: (1) the number of charges being processed; (2) the number of charges backlogged in the inventory; and (3) the number of charges resolved during a specified period of time. Consequently, the Chairman, district directors, regional attorneys and line supervisors at the EEOC echo the need to produce numbers to impress the Congress and the public.

While it may be correct to state that Congress has held EEOC to account for the number of charges processed, no amount of pressure may excuse the closure of cases without regard to the merits. Such actions constitute a flagrant misrepresentation to the Congress and to the public at large and severely disserve the charging parties who look to EEOC to resolve their complaints of discrimination.

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[52] *See* Staff of House Subcommittee on Equal Opportunities, Committee on Education and Labor, 94th Cong., 2d Sess., Report on Investigation of EEOC's Thirty-Day Turn-Around Project (Comm. Print 1976).

While the number of charges being filed with the agency continues to increase over the years, it was learned that the number of field investigators actually processing charges has, in fact, decreased significantly due to the 1979 and 1984 reorganizations imposed by the agency. Therefore, the workload per investigator—particularly in the rapid units—has become, in the view of Commission staff, substantial, if not unmanagable. The majority of the investigators interviewed stated that their average caseload ranges from 85 to over 100 charges at any one time. This increased volume of work, with fewer investigative staff, results in the Commission's inability to conduct adequate investigations according to staff interviewed.

Committee staff were informed that the agency currently places more emphasis on the number of cases processed and the age of the cases rather than on the completeness or quality of the investigations. Supervisors have processing assumptions which they impose on their staff, including rigid timeframes for conducting investigations. On average, the rapid unit supervisors require their investigators to complete processing of charges within 150 days from the date the charge was filed with the Commission.

Some investigators are reportedly required, under threat of a low performance rating, to prematurely close an investigation rather than miss a supervisor-imposed deadline. This is frequently the situation with charges over 300-days-old without regard to the complexity of the charge, the age of the case when assigned to the investigator, the fact that an employer may be recalcitrant in providing necessary information, or the need to do a more in-depth investigation based on the particular allegations. Committee staff were told that unit supervisors have been advised that the Commission does not want charges over 300-days old in the inventory.[53] This directive, in most offices, is currently being strictly enforced by the RCP unit supervisors as well as other unit supervisors, resulting, in some instances, in the premature closure of 300-day old charges. Investigators stated that such policies and actions appear to contravene Title VII of the Civil Rights Act of 1964, *as amended.* In addition, these policies provide no incentive to employees to do quality work.

A 1985 internal audit of the case processing management in the Chicago District Office corroborates the information received by Committee staff concerning the problem of inadequate investigations conducted in that office. The audit report stated that, ". . . cases often appear improperly concluded or written up largely on the statements of respondents." The report also found

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[53] In fact, EEOC Chairman Thomas testified before the Subcommittee on Employment Opportunities, Committee on Education and Labor on October 27, 1983, that in order to prevent a new buildup of aging charges, the Commission instituted a project to reduce the number of charges over 300-days old. Moreover, he stated that the proposed changes in the case tracking system, "[w]ill help to eliminate the numbers game approach to management accountability which so concerned me when I assumed the position of Chairman." *See* The Federal Enforcement of Equal Employment Opportunity Laws: Hearing Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor, 98th Cong. 1st Sess. (1983) (Statement of Hon. Clarence Thomas, Chairman, the EEOC). The EEOC Office of Program Operations' Annual Report for fiscal year 1985 indicates that the 300-day-old charges represented 42 percent of the EEOC's inventory in FY 1982; however, the 300-day-old charges represented only 2.3 percent in FY 1983; 2.7 percent in FY 1984; and 5.3 percent in FY 1985. *See Annual Report, supra.* (EEOC FY 82–85 Total Pending and Total 300-Day Chart.)

that, in some instances, witnesses were not contacted and possible class-based allegations were not investigated.[54] A report by Women Employed Institute made similar findings concerning this office.[55]

Field investigators expressed concerns about whether they can realistically do thorough investigations, given their excessive caseloads and other budgetary and resource constraints. They further stated that if the Commission wants quality investigations, the length of time necessary to conduct the investigation will have to be increased. Despite the Commission's current push for more onsite investigations, travel funds have been severely reduced and government-provided transportation is often not available for this purpose.

Due to the tremendous workload, it sometimes takes an EOS six months or more before an initial contact to the charging party and respondent is made. This is most disturbing to the charging parties who are informed during the intake interview that they will be contacted by an investigator within 30 to 60 days.

Low employee morale in the investigative units appears to be widespread. This morale problem apparently has frequently caused new investigators to become disenchanted and move on to other jobs at the first opportunity. Field staff stated that the loss of these and other investigators is having a negative impact on the Commission's ability to target resources adequately in order to maintain the development of expertise in the talents of seasoned investigators. In addition, some career investigators in most of the district offices visited stated that they have lost pride in their work product as well as enthusiasm for their jobs. They repeatedly stated that the best interests of the charging parties are no longer the primary concerns of the Commission

According to investigators in Birmingham there was a wholesale closure of cases at the end of fiscal year 1985, ostensibly in order to "pad" the workload statistics and make the district office look good for the year. Information subsequently received appears to confirm this allegation. In another district office, a different method of inflating the office productivity was allegedly used. In that instance, one charge filed by one individual against a single company having 52 different facilities was allegedly "exploded" into 52 different charges and was subsequently reported as 52 closures.

The way investigators are rated also affects the way investigations are conducted. Although the employee's General Performance Appraisal and Development System (GPAD) contains no production quotas, the critical elements for rating an employee are based on processing assumptions devised by and strictly within the control of the supervisor. For example, meeting assigned timeframes and the processing of 300-day-old charges—despite extenuating circumstances beyond the control of the investigator—are in some cases considered critical elements in the employee's performance appraisal. The problem with the appraisal system, it was reported, is

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[54] *See* Memorandum from Joseph S. Bennett, Director, Region II Program, Office of Program Operations, to Kate Blunt, Director, Chicago District Office, (concerning) Program Management and Quality Assurance Reviews of the Chicago District Office (October 29, 1985).

[55] *See* Women Employed Institute, *Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration* (1986).

that it places heavy emphasis on the rapid closure of cases, rather than on the quality of the investigations.

Employees who fail to meet the critical elements in their GPADs are placed on a Performance Improvement Plan (PIP). A "PIP" is a way of placing employees on notice that if they demonstrate no improvement over a specified period of time, according to the critical elements specified in the GPADs, they will be fired.

The EEOC has an obligation to ensure prompt and quality investigations. However, the investigators interviewed in the rapid units stated that it is difficult to achieve this Commission goal given the limitations affecting their work.

With the downgrading of the intake units, more experienced investigators in the enforcement units are questioning the quality of the charges developed (or "perfected") by the intake staff. The RCP investigators, for example, frequently have to reinterview the charging parties because of insufficient notes or certain documentation (e.g., affidavits) missing from the files. In addition, recalcitrant respondents often refuse or delay submitting vital information requested by the EEOC. In sum, these factors create unnecessary delays in the processing of the charges beyond the control of the investigators.

Under the new enforcement procedures, virtually no fact-finding conferences are being conducted by a majority of the district offices visited. Only the Chicago District Office reported that up to 30 percent of the cases still undergo fact-finding conferences. Employers, in the past, preferred fact-finding conferences for quicker settlements and resolution of matters. With the new emphasis on tougher enforcement, EEOC must now have all the necessary documents in the file before attempting to negotiate settlements. Unlike negotiated settlements prevalent in previous years, the new enforcement policies seek full relief for the charging parties and therefore discourage negotiated settlements with employers. In fact, the number of settlements overall has decreased significantly over the past few years.[56]

The ability to conduct a thorough investigation often necessitates the need to do an on-site review of respondent's employment practices. This involves traveling to the employer's facility. Although on-site investigations are more typically done by the extended investigation units, according to EEOC field staff interviewed, no more than 5 percent of the cases in the rapid units are handled through actual on-site investigations. According to them, most investigations are done by telephone or through the mail. Field staff generally reported that on-site investigations are restricted by the lack of travel funds or the unavailability of a GSA-issued vehicle for this purpose.

Due to the increasing workload and the pressure for rapid closures of cases, investigators report that there is little regard for the merits of charges and that, as a consequence, more cases are closed with "no cause" determinations.[57]

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[56] In fiscal year 1982, settlements accounted for 29.4 percent of the total closures; in fiscal year 1985, only 14.4 percent of the charges processed were settled. *See* Appendix K, Table 3A.

[57] In fact, "no cause" determinations have increased 21.2 percent since FY 1982 under Chairman Thomas' administration. Of the total charges closed during that year, 35 percent were

Continued

E. Extended Charge Processing Units (ECP)

BACKGROUND

Certain EEO complaints requiring more in-depth investigations are more appropriately handled by the extended investigation units of the Commission. Those cases flagged by the intake unit as Early Litigation Identification (ELI) charges or those charges identified by the rapid units as having potential for litigation are assigned to the extended units. Extended charges typically involve class allegations under Title VII, the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA) complaints. Allegations of racial discrimination due to job segregation, national origin complaints involving an "English Only" rule and sexual harassment complaints also are processed by the extended units.[58]

Adequate documentation to substantiate the charging party's allegations is the primary focus of the prolonged investigation of the extended unit. Ideally, this requires going to the respondent's facility to review records and to interview witnesses.

ANALYSIS

Staff interviewed stated that, in the past three years, relatively few on-site investigations were conducted. Only recently have investigators been encouraged to do more on-sites. Now, anywhere from 15 to 50 percent of the extended charges are processed through actual on-site investigations according to the district offices visited.

Due to the complexity of the allegations and the limited staff, the average workload per investigator in the extended units is approximately 30 cases, with an assumed processing time of about 250 days to complete each investigation. Certain variances are allowed in some instances, particularly for ELI charges. However, like their colleagues in the rapid units, extended investigators also feel the pressure for swift case closures and inadequate opportunity to perform full investigations—usually within the 300-day requirement.

Commission staff also reported that the EEOC's new emphasis on identifiable victims of discrimination, combined with the pressure to close cases, is adversely affecting the manner in which class actions are processed. According to some Commission employees, the agency now actively avoids class actions during the investigation of charges.[59] In Birmingham, Committee staff witnessed approximately 75 individuals file into the office to register complaints against a processing plant. These individuals had been fired en masse the day before. Committee staff learned from Commission investigators that, according to their past experience, these 75 complaints will be processed as individual charges assigned to several investigators

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issued "no cause" determinations. In FY 1985, 56.2 percent of the charges processed were closed with "no cause" decisions and only 3.1 percent were closed with "cause" findings on the merits. *See* Appendix K, Table 3A.

[58] *See* 1 *EEOC Compl. Man., supra,* at Charges, Section 2 (August 1984).

[59] According to the Commission's litigation statistics, 54 percent of the number of cases authorized for litigation during FY 1985 had class allegations. *See* Appendix K, Table 8A. Although intake unit EOSs routinely indicate on the charge form that certain charges have class implications, the charges are ultimately processed as individual rather than class charges.

and, thereafter, will be reflected as 75 individual closures rather than as a class action investigation/complaint against the company. The district director subsequently confirmed this practice.

F. Interface With Legal Units

BACKGROUND

One positive outcome of the new enforcement policies is that it encourages more communication between the compliance units and the legal units. Prior to the reorganization of 1977, attorneys in the litigation centers were not only physically separated from compliance staff, but in fact had very little interaction with them. Under the present system, with the Commission's emphasis on "predictability of enforcement," attorneys have been given more of a role in ensuring that stronger and more thoroughly investigated cases will be presented to the Commission for possible litigation.

Most of the district offices visited promote active communication between the units, with some offices exemplifying a team management approach to case processing. In this team effort, the compliance units are to conduct full investigations and the legal units are to conduct quality assurances through their reviews of the legal sufficiency of the charges.[60]

Attorneys are assigned on a daily, weekly or as needed basis to work with the intake supervisor and compliance supervisors in screening and targeting cases which have a strong potential for litigation. The Chicago Office requires at least five cases from intake on a weekly basis for consideration by the Top Management Committee (TMC). This Committee, consisting of the district director, regional attorney, compliance managers, and often the supervisors of the legal and compliance units, encourages group reviews of charges flagged as "SWAT" or "BLITZ" cases. These targeted cases are assigned attorneys at the initial stages and are closely tracked as they move through the system.

Attorneys are also assigned to provide legal advice to compliance unit staff regarding other charges which are not necessarily targeted as ELI vehicles. In Houston, a case management review committee brings together the regional attorney, trial attorneys, compliance supervisors and investigators for extensive reviews of cases prior to submitting a recommendation of "cause" or "no cause" to the district director, who makes the final decision. This team approach provides both an opportunity for trial attorneys to argue the litigation worthiness of cases early in the review process and an excellent opportunity for investigators to develop a clear understanding of what an investigative memorandum must contain to justify a "cause" or "no cause" finding. In addition, this review committee helps to expedite the clearance process and promotes close working relationships between the units.

The close liaison between legal and compliance units may have its disadvantages. Presentation memos prepared by the legal units in support of or against litigation carry greater weight than the investigator's memos, with respect to the fate of the allegations. Dis-

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[60] *See* 2 *EEOC Compl. Man., supra*, General Counsel Manual, Chapter 2 (July 1980).

trict directors often rely heavily on the arguments made in the presentation memos when making their final decision to issue a "cause" or "no cause" finding. Investigators report that the legal units often discourage them from recommending "cause" findings if the attorneys think that the cases are not "winnable" in court.

Moreover, this reported use of attorneys for consultations in cases involving individual charging parties, which are generally of little complexity as a matter of law, may be a waste of time which could be better spent attacking patterns and practices of discrimination. Arguably, a well-trained investigator should be able to frame a charge and conduct an investigation which unearths sufficient evidence to demonstrate whether there is reasonable cause to believe that the charging party's allegation has merit. Lawyers should not be used to compensate for inexperienced or untrained compliance staff. Instead, they should be used to conduct litigation and to provide consultation only for complex legal questions, which more often arise in the Early Litigation Identification or "ELI" cases and in the systemic enforcement program.

V. SYSTEMIC ENFORCEMENT PROGRAM

BACKGROUND

The enforcement powers authorized under the 1972 Amendments to Title VII gave the EEOC the mechanism to attack pervasive, institutionalized patterns and practices of discrimination.[61] The 1972 Amendments to Title VII provided the statutory basis, through Section 706(b) and Section 707, for the transformation of the EEOC into a law enforcement agency. Section 706(b) provides a person claiming to be aggrieved, or a member of the Commission, authority to file a charge of unlawful employment practices. Section 707 provides authority for the EEOC to file a lawsuit in federal district court. Through the use of "Commissioner's charges",[62] based on these two provisions, EEOC can target discriminators in major industries and regions across the country irrespective of whether or not it has received complaints from individuals.

Although the potential for a vigorous systemic enforcement program has been available to the Commission since 1972, the systemic program did not become fully operational until 1979 when systemic units, devoted exclusively to the investigation and litigation of Section 707 and Section 706(b) "pattern or practice" suits, were established in the field offices.[63] Over the years, the program has been plagued with instability in staffing, vague and constantly changing policy directives and the mammoth task of having staff take years to analyze volumes of data to substantiate multi-based, multi-issue allegations on which to file suit against targeted employers. As a result, it has typically taken three to five years, or longer, to investigate and resolve systemic charges.

The energetic and effective systemic enforcement program envisioned by the Congress requires a significant expenditure of resources and a reassessment of priorities. If properly targeted, Commission resources could address both the need to resolve individual complaints as well as the Commission's statutory obligation and mandate to eliminate systemic job discrimination. However, witnesses during previous oversight hearings have strongly criticized the low priority and inadequate resources devoted to this program, as well as the "sorry record of EEOC-initiated litigation against

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[61] *See* The Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (1972); 42 U.S.C. Sec. 2000e-5(b) [hereinafter referred to as "Section 706" and "Section 707," the more commonly-used statutory references].

[62] Section 707 of Title VII authorizes the filing of a "pattern or practice" lawsuit by any individual Commissioner of the EEOC; thus, systemic charges are often referred to as "Commissioner's charges".

[63] *See* The Federal Enforcement of EEO Laws: Oversight Hearings Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor, 96th Cong., 1st Sess. (1979) (Statement of Eleanor Holmes Norton, Chair, EEOC).

systemic patterns of employment discrimination since 1972." [64] According to testimony during those hearings, although the Commission authorized a total of 142 Commissioners' charges from 1972 to 1983, only 9 systemic lawsuits were filed during the first 11 years of the program.[65] To date, the Commission has failed to allocate adequate resources to conduct a vigorous program of "pattern and practice" litigation envisioned under Section 707 of Title VII.[66]

ANALYSIS

Generally, the systemic units visited did not appear to be inundated with work as compared to the legal and compliance units. On average, the district offices' caseload consisted of about six active systemic cases either in investigation, conciliation or in settlement posture. As noted above, because of the magnitude of the allegations, these cases generally take years to resolve. In one district office, for example, a systemic lawsuit was recently filed against a company, but only after EEOC had assembled a lengthy record of discriminatory practices dating back to 1977. In 1983, the Commission signed a $42.6 million settlement agreement with General Motors Corporation to resolve a 10-year-old systemic charge.[67]

Data on systemic enforcement from the six district offices visited show that the majority of the cases are still under investigation, some of which were initiated six or seven years ago. Field systemic staff told the Committee staff that data on these cases is stale and that if the Commission decides to litigate these cases, most of the information would have to be updated. In addition, the Birmingham office reported that not a single systemic case has been closed since fiscal year 1980.[68]

Systemic units depend greatly on EEO–1 reports, which are filed yearly by employers. These yearly employment profiles provide the basis for targeting employers who fail to make good faith efforts in promoting equal employment opportunity. Prior to the August 1985 reorganization of the systemic program, once an employer was targeted for a systemic investigation, there were numerous steps taken to develop a strong case and there were multiple layers of review and approval at the headquarters' Office of General Counsel, Office of Field Operations and Commissioners' Offices prior to proceeding with the investigation, conciliation or litigation. Often this meant that cases were stagnant for weeks or months, or possibly years. This delay was quite frustrating to the field systemic staff who wanted to move on with the investigations or negotiations.

Field systemic staff indicated that another frustration is the fact that they are receiving mixed and often confusing signals from headquarters on how to proceed with systemic enforcement, par-

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[64] *See* The Federal Enforcement of Equal Employment Opportunity Laws: Hearings Before the Subcomm. on Employment Opportunities, Comm. on Education and Labor, 98th Cong., 1st Sess. (1983) (Statement of Professor Herbert Hill.)

[65] *See id.*

[66] *See* Appendix K, Tables 7A, 7B and 7C, for statistics on the Commission's systemic program.

[67] *See EEOC News*, "EEOC, General Motors and Union Sign Record-setting Equal Opportunity Accord" (October 18, 1983).

[68] *See* Appendix K, Tables 7B and 7C, for systemic charge processing statistics from FY 1982 to FY 1985 from six district offices of the EEOC.

ticularly with respect to the issue of goals and timetables. Systemic staff interviewed stated that there has been no enunciated or written Commission policy change regarding goals and timetables. However, in the St. Louis District Office, for example, a conciliation agreement was drafted, with the concurrence of the respondent, to include goals and timetables. The field systemic staff subsequently learned that the Commission will most likely reject that conciliation proposal because of the provision for goals and timetables and that the case will be returned to the district office for revision. Staff in other offices also indicated that they are getting similar signals from headquarters to delete references to goals and timetables.[69]

It was noted that if, in fact, field systemic staff continue to receive instructions from headquarters that goals and timetables are no longer permissible in devising remedies to correct systemic discrimination and that the actual harmed individuals must be identified at the outset rather than during the course of the systemic investigation, there may be a chilling effect on enforcement, resulting in missed opportunities and the potential inability of the EEOC to vigorously pursue and correct discriminatory patterns and practices prohibited under Section 707 of Title VII.

In August 1985, the systemic program was reorganized in headquarters to address some of the structural problems discussed above.[70]

As a result of that reorganization, the General Counsel directs systemic litigation and the Director of Field Operations oversees the Investigations Group and the Field Contact/Legal Standards Group. The goal of this reorganization is to improve headquarters and field systemic operations by streamlining the process and giving more discretion to the field staff in administering the program. Headquarters systemic staff will continue to provide technical assistance and guidance to the field. However, the district director and field systemic staff will be responsible for developing systemic targets. In addition, the many layers of review and approval at headquarters' Office of General Counsel, Office of Program Operations and the Commissioners' offices for consideration of investigative plans, conciliation agreements and litigation recommendations will be reduced in order to expedite the processing of future systemic cases. Bi-monthly conference calls between headquarters and field staff is intended to help identify problems and provide updates on the status of systemic cases.

Committee staff learned that the district offices of the EEOC have been instructed by headquarters to bring the current systemic cases to some resolution and to move on to new systemic targets. In January 1986, the Commission started pilots of systemic targeting models at each district office. The field systemic staff learned that,

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[69] *See* section IV B above for more discussion regarding EEOC's revised policy on goals and timetables.

[70] The Commission notified the district directors in a June 2, 1985 memorandum about the reorganization of EEOC's systemic program. However, the reorganization was effective in August 1985. Memorandum to District Directors from James H. Troy, Director, Office of Program Operations (regarding) Reorganization of EEOC Systemic Program (July 2, 1985). Although the Commission first decentralized the systemic program during the Norton Administration, this most recent reorganization reportedly provides more discretion to district directors regarding the manner in which systemic charges are developed, processed and decided.

in addition to multi-based, multi-issue systemic charges, the Commission is seeking more variety of cases and creativity in systemic enforcement, including more frequent use of "Limited Scope Commissioner's Charges".[71] It is too early to determine whether this mixed targeting approach will prove to be more effective in attacking and eliminating system-wide discrimination by employers across the country.

[71] "Limited Scope Commissioner's Charges" are authorized under Section 706 of Title VII. These charges involve matters of such significant enforcement potential that they meet one or more of the Commission's substantive standards for the selection of systemic charges but do not fall within the administrative parameters of the Commission's systemic program. The charges are developed by the district director, the Top Management Committee (TMC) and the systemic unit supervisor. Limited Scope Commissioner's Charges generally involve only one facility and will include a limited number of bases or issues. In addition, Limited Scope Commissioner's Charges differ from Commissioner-initiated charges and systemic charges in that Limited Scope Commissioner's Charges are proposed by the field offices and no not involve field systemic targets. Responsibility for investigation of the limited scope charge is assigned by the district director.

VI. LEGAL UNITS

The primary responsibility of the trial attorneys in the legal units is to recommend cases, through the district director and, subject to the General Counsel's approval, to the Commission for litigation, and to prosecute cases in federal district court. In 1980, these duties were expanded to include participation in pre-complaint processing of charges selected for the Early Litigation Identification (ELI) program.[72] As of September 1984, attorneys are to give legal advice to district office staff during all phases of the charge investigation process.[73]

In addition to the opinions and concerns expressed by the staff regarding the Commission's new enforcement policies, legal unit staff were most troubled and spoke at length about the misperceptions given by the Commission regarding their workload, and about the critical insufficiency of litigation support resources.

Legal unit attorneys explained that, although it has been alleged that they handle an average of only 2.3 cases per attorney, their work entails much more than actively litigating cases. One attorney estimated that fifty percent of legal unit work consisted of compliance activity. Attorneys must review letters of determination, supervise Early Litigation Identification Charges (ELIs), work with the systemic units, assist with conciliations, handle public inquiries, Freedom of Information Act requests and questions from the intake units. Interfacing with the intake unit, it was explained, is absorbing much more attorney time due to the relative lack of experience of the newly downgraded intake unit personnel.[74] Legal unit attorneys also assist private counsel in monitoring cases at the post-judgement stage.

Committee staff also learned that regional attorneys are required to recommend for litigation at least 24 cases per year. If the quota is not met, the regional attorney's evaluation is adversely affected. Some regional attorneys find this requirement to be reasonably attainable and expected to exceed the standard. Others strongly criticized this quota as arbitrary, not related to the varying complexity of cases and not feasible, given the lack of support staff. Nor does it account for issues and circumstances outside the attorney's control, or for the number of inadequate and incomplete investigations which are performed by compliance staff who are inundated with work and do not have the time to do complete investigations. Although headquarters may grant "variances" to regional attorneys who can not achieve their litigation goal or quota, it is not clear in what circumstances such variances are granted.

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[72] *See* 2 *EEOC Compl. Man., supra*, General Counsel Manual, Chapter 2 (July 1980).
[73] *See Statement of Enforcement Policy*, September 11, 1984, reprinted in Appendix F.
[74] *See* Section IV A above.

One of the primary concerns of the legal unit employees was the lack of legal support resources and the exacerbating effect that the new enforcement policy will have on these scarce resources and on the attorneys' ability to do quality work. For example, there are insufficient travel funds or qualified clerical staff to perform the typing and other functions required. As a consequence, lawyers admitted that they frequently must carry out, and in some instances, pay for, their own support functions in order to meet often inflexible, court-imposed deadlines.

The Committee staff found that several of the district offices visited have inadequate or non-existent law libraries, with no librarians. Thus, lawyers are also faced with having to maintain the libraries. Lawyers at the St. Louis office noted that they have not had a legal docket clerk since 1980. Thus, lawyers at that office must do their own docketing and, despite this problem, are faced with quality reviews or audits of their files by the Office of General Counsel at headquarters.

As a result of the paucity of litigation support resources, one lawyer in New York said, "We [lawyers] writes 'em. We types 'em. We serves 'em." This critical situation is exacerbated by the fact that, in many cases, opposing parties are represented by large, well-staffed law firms who have almost limitless staff resources with which to defend their clients.

Legal unit staff also unanimously decried the expert witness procurement process, which they described as extremely cumbersome. A number of the lawsuits which EEOC attorneys file are class actions requiring expert witnesses to analyze data and testify concerning the results of their analyses. Expert witnesses must be approved by means of a multi-layered process which occurs in headquarters. This process may take four months, if there are no delays, and longer in some instances. Examples were given of cases in which the clearance process took six months or longer. In addition, if an expert witness's services are required after the funds approved are expended, the expert witness contract has to be amended in order to obtain the additional funds. This process may take another four months. In fact, in some instances, experts were approved *after* the point at which they were needed. In the face of very rigid time constraints, often requiring attorneys to go to trial within four months of the filing of the complaint, the expert witness procurement process has become a barrier to the effective prosecution of an EEOC complaint.

One concern often voiced by the legal staff related to the subpoena process. A recalcitrant employer unwilling to voluntarily supply documentation to EEOC investigators can stop an investigation in its tracks. To obtain compliance with an administrative subpoena, it is sometimes necessary to initiate a judicial enforcement proceeding. Approval of the General Counsel's Office at headquarters must be obtained prior to the initiation of such an action. Attorneys complained that, to obtain this approval, they must create documents detailing the process of the investigation, describing the types of materials sought from an employer and justifying their request therefor. Approval of requests for subpoena enforcement actions sometimes takes several months, during which time complainants may lose interest in pursuing their charges. In addition,

the delay sometimes gives charging parties the impression that the Commission is simply "sitting on" their complaints. Attorneys were not able to articulate any policy considerations requiring headquarters approval for summons enforcement actions. They felt that the process demonstrated unnecessary oversight of routine litigation issues that they were competent to handle.

Overall, legal unit attorneys felt that headquarters staff in charge of dispersing resources did not understand the litigation process. Moreover, some suggested that because of this lack of understanding, which impeded the ability of legal staff to effectively litigate cases, control of the litigation budget should be completely separated from the compliance (i.e. charge processing) budget. Lastly, attorneys strongly admonished that the increased number of cases to be litigated pursuant to the Commission's enforcement policy must be accompanied by corresponding increases in funding. As indicated earlier in this report, legal unit staff project a substantial increase in the litigation workload. Given the critical condition of support services and resources, an increase in this workload, without an increase in litigation support and a more streamlined subpoena enforcement and expert witness procurement process, will undermine the effective enforcement of the civil rights laws under the EEOC's jurisdiction.

VII. CONCLUSION

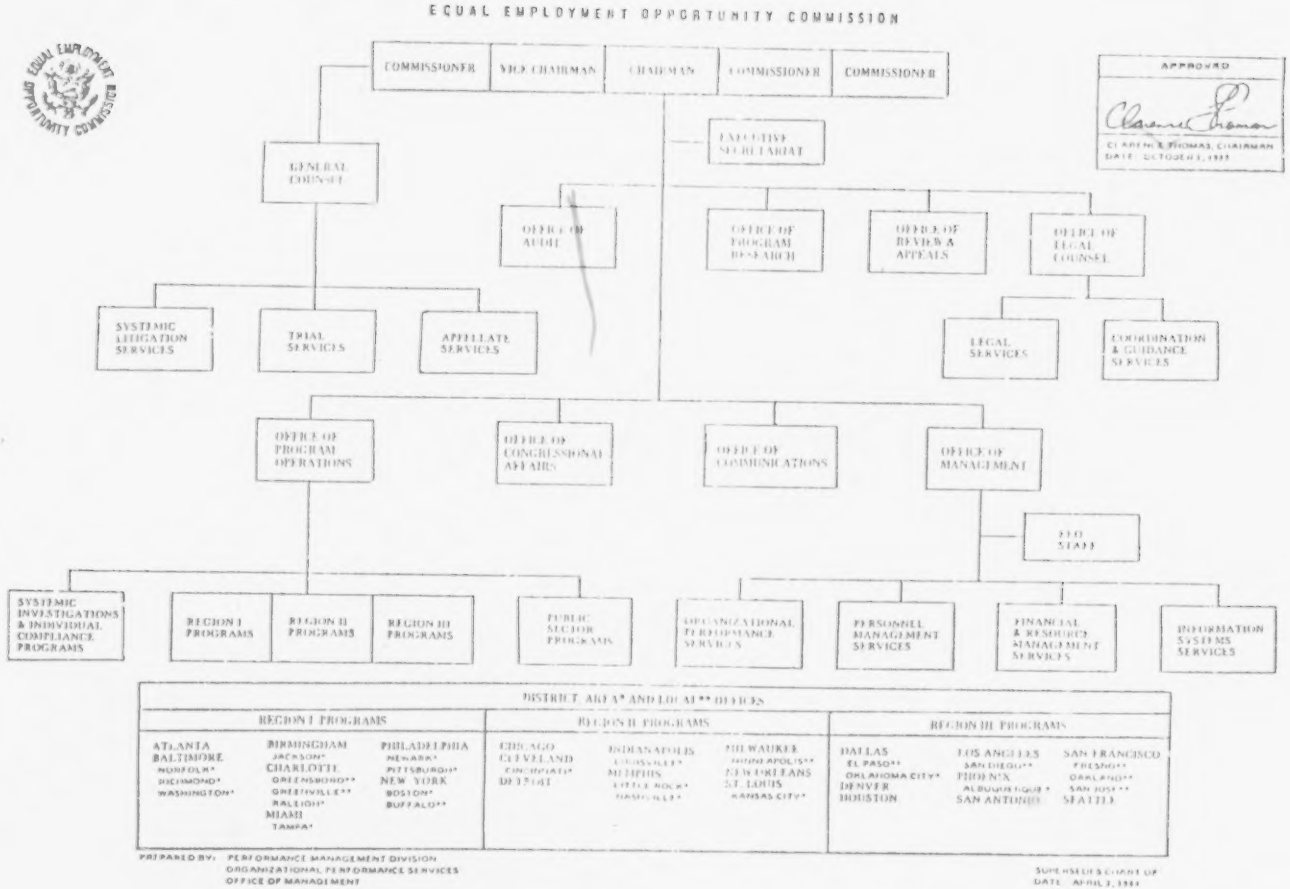
In conclusion, Committee staff were impressed with the apparent commitment of the EEOC district office staff to the mission of the agency. Equally impressive was the amount of energy and initiative which some district directors displayed in their efforts to enhance the enforcement of the agency. As this report has revealed however, there are serious problems, both as to the Commission's enunciated and *de facto* policies and its case processing system, which must be addressed in order for EEOC to execute its mission more efficiently and effectively. If the above problems are analyzed and resolved, the EEOC has the potential to become the aggressive and effective civil rights enforcement agency that it was established to be.

The Commission should never lose sight of the fact that its primary concern is to protect the rights of individuals who seek redress under the fair employment practices laws entrusted to it. It is they for whom the Equal Employment Opportunity Commission was established in 1964, and it is they for whom the mission of the agency must remain of paramount importance.

APPENDICES

Appendix A: EEOC's Organizational Chart.
Appendix B: Glossary of Terms.
Appendix C: The Statutes within EEOC's Jurisdiction.
Appendix D: EEOC's *Affirmative Action Guidelines.*
Appendix E: Regulatory Program of the United States Government.
Appendix F: EEOC's *Statement of Enforcement Policy* and *Policy Statement on Remedies and Relief for Individual Victims of Unlawful Discrimination.*
Appendix G: *Washington Post* Article on Goals and Timetables.
Appendix H: Letters to and Responses from EEOC Regarding Goals and Timetables.
Appendix I: Consent Decree in *June Meyer et al.* v. *MacMillan Publishing Co.*
Appendix J: *Uniform Guidelines on Employee Selection Procedures.*
Appendix K: Case Processing and Litigation Statistics.

APPENDIX A
EEOC's Organizational Chart



APPENDIX B

GLOSSARY OF EEOC TERMS

ADMINISTRATIVE ENFORCEMENT - The Commission is required to resolve complaints of employment discrimination through the administrative process (investigation and conciliation) prior to the use of legal enforcement.

AFFIRMATIVE ACTION - Voluntary or required action taken by an employer to improve the employment opportunities of minorities, women and handicapped persons.

BASIS (ES) - The reason(s) under Title VII that alleged job discrimination was committed (i.e., race, sex, color, national origin or religion).

CAUSE DETERMINATION - A determination by the Commission that there is reasonable cause that a charge of discrimination has merit.

CHARGING PARTIES - Persons or organizations filing charges of discrimination.

COMMISSION DECISION PRECEDENT (CDP) - Generally, this term refers to charges where the Commission has established Commission policy on the issues in the charge and where the charge need not be sent to headquarters for consideration by the Commissioners. (Sec. 603 of Volume II of the Compliance Manual)

COMMISSIONER'S CHARGE - Charge of employment discrimination filed by an EEOC Commissioner on behalf of an individual or alleging a systemic or pattern and practice of employment discrimination.

CONCILIATION - A successful Resolution of a charge which provides an acceptable remedy to a charging party(ies) following a determination of cause.

DEFERRAL - The process which allows State and Local Fair Employment Practice (FEP) agencies to have the first opportunity to resolve an employment discrimination charge.

EEO SURVEY - A report submitted by employers, unions and apprenticeship programs which contains a statistical profile for minorities and women. There are six different reports. The EEO-2, is not required at this time.

EEO-1 Private Employer
EEO-2 Labor Organization
EEO-3 Joint Apprenticeship Information
EEO-4 State and Local Governments
EEO-5 Public Elementary Secondary and Education Staff
EEO-6 Higher Education, Public/Private Institutions

FEP AGENCIES - State and local government agencies that enforce fair employment practice laws.

INTER-AGENCY COORDINATION - The Commission's responsibility for providing leadership and coordination to Federal agencies in their efforts to enforce federal EEO statutes, executive orders, regulations and policies; and for eliminating competition, duplication, conflict, and inconsistency among Federal agencies enforcing EEO statutes orders, regulations and policies.

ISSUE(S) - The allegation(s) of employment discrimination raised by the charging party (i.e., recruitment, hiring and discharge, etc.).

LETTER OF DETERMINATION (LOD) - This term refers to a written notice, issued by the Commission or its official designee to an employer and charging party(ies) which states whether or not the Commission has determined that reasonable cause exists to believe employment discrimination has occurred in accordance with the allegation contained in the charge.

NO CAUSE - An administrative finding by the Commission that the evidence available to it does not support the claim of discrimination.

NON-COMMISSION DECISION PRECEDENT (NON-CDP) - Generally, this term refers to charges where the Commission has not established or is in the process of establishing Commission precedent and where the charge must be sent to headquarters for consideration by the Commission. (Sec. §603 of Volume II of the Compliance Manual).

PRE-DETERMINATION SETTLEMENT - An agreement to resolve a charge of employment discrimination which is secured before the Commission issues a determination on the merits of the charge.

RESPONDENT - An employer, union or employment agency, which has been charged with an alleged violation of Title VII.

RIGHT-TO-SUE - The statutory right of charging parties to terminate their involvement in the Commission's administrative process and secure a notice enabling them to proceed by filing a complaint in Federal court.

SUBPOENA - An investigative tool issued by the Commission to obtain access to evidence (e.g., files, records, documents, or the testimony of witnesses).

SYSTEMIC DISCRIMINATION - Employer practices and/or policies which have a disparate impact upon persons or classes protected under equal employment laws.

VOLUNTARY ASSISTANCE - Educational and technical assistance provided for both employers, labor organizations, employment agencies and individuals for the purpose of educating and otherwise informing them of their responsibilities or rights under Title VII and other related EEO laws and regulations.

eeoc U.S. Equal Employment Opportunity Commission Washington, D.C. 20506

Laws Administered by EEOC

TITLE VII of the
CIVIL RIGHTS ACT
OF 1964, AS AMENDED

THE AGE DISCRIMINATION
IN EMPLOYMENT ACT
OF 1967, AS AMENDED

THE EQUAL PAY ACT OF 1963

SECTION 501, REHABILITATION ACT OF 1973
(Prohibitions against discrimination because
of handicap in the Federal sector)

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

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TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY [1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (B) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the

[1] Includes 1972 amendments, made by P.L. 92-261 printed in Italic.

meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other education institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or

other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b),* shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all

the powers of the Commission and three members thereof shall constitute a quorum.

(*d*) The Commission shall have an official seal which shall be judicially noticed.

(*e*) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(*f*) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(*g*) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(*h*) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activites.

(*i*) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. *(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(*b*) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as*

practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter,* except that in a case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,* such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection *(c)* or *(d)*, the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may* be brought

against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission*, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) *or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to

amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies*, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisons under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied*, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with

those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency, charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.*

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council)

composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall

include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or ; rtion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

PROVISIONS OF EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 WHICH RELATE TO BUT DO NOT AMEND THE CIVIL RIGHTS ACT OF 1964

SEC. 9. (a) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause:

"(58) Chairman, Equal Employment Opportunity Commission."

(b) Clause (72) of section 5315 of such title is amended to read as follows:

"(72) Members, Equal Employment Opportunity Commission (4)."

(c) Clause (111) of section 5316 of such title is repealed.

(d) Section 5316 of such title is amended by adding at the end thereof the following new clause:

"(131) General Counsel of the Equal Employment Opportunity Commission."

SEC. 12. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (9);

(2) striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (10) the last time it appears therein in the following new paragraph:

"(11) the Chairman of the Equal Employment Opportunity Commission, subject to the standards and procedures prescribed by this chapter,

may place an additional ten positions in the Equal Employment Opportunity Commission in GS–16, GS–17, and GS–18 for the purposes of carrying out title VII of the Civil Rights Act of 1964."

SEC. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

1978 AMENDMENTS TO CIVIL RIGHTS ACT OF 1964

[¶ 300]

[¶ 301] [Enacting Provision]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

[¶ 302] [Ban on Pregnancy Discrimination]

Section 1. That Section 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

"(k) The terms, 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.".

[¶ 303] [Effective Dates]

Sec. 2. (a) Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment on the date of enactment of this Act until 180 days after enactment of this Act.

[¶ 304] [Adjustments in Benefit Plans]

Sec. 3. Until the expiration of a period of one year from the date of enactment of this Act or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: Provided, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: And provided further, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, AS AMENDED* (29 U.S.C. 621, et seq.)

An Act

To prohibit age discrimination in employment

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, that this Act may be cited as the "Age Discrimination in Employment Act of 1967".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially longterm unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in the employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

EDUCATION AND RESEARCH PROGRAM

SEC. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

PROHIBITION OF AGE DISCRIMINATION

SEC. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

*The original text of the Age Discrimination in Employment Act of 1967 is set in the "Century" typeface. Added or amended language as enacted by subsequent amendments is represented by other typefaces as indicated below:

Amendments	Typeface Used	Public Law	Date Enacted	Statute Citation
Original	Century	90-202	12/15/67	81 Stat. 602
1974	**Century Boldface**	93-259	4/8/74	88 Stat. 55
1978	*Century Italics*	*95-256*	*4/6/78*	*92 Stat. 183*

(c) it shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age,

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employee to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual;*[1] or

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

SEC. 5. *(a)(1)* The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. *Such study shall include—*

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 12(a) of this Act to 70 years of age;

(B) a determination of the feasibility of eliminating such limitations;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 12(c), relating to certain executive employees, and the exemption contained in section 12(d), relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

ADMINISTRATION

SEC. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems

[1] As amended by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978. The effective date of this amendment is set forth in section 3(b) of the 1978 amendments: *"The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938) and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first."* The revision of section 12 of the ADEA in the "amendment made by section 3(a) of this Act" referred to in the previous sentence.

necessary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c)*(1)* Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.[2]

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.[3]

(e)*(1)* Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of one year.[4]

NOTICE TO BE POSTED

SEC. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

SEC. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish

[1] Effective with respect to civil actions brought after April 6, 1978.

[2] Effective with respect to civil actions brought after April 6, 1978. Prior to the Age Discrimination in Employment Act Amendments of 1978, section 7(d) read as it does now, except that it required a "notice of intent to sue" rather than a "charge alleging unlawful discrimination."

[3] Effective with respect to conciliations commenced by the Secretary of Labor after April 6, 1978.

such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

SEC. 10. Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

SEC. 11. for the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty [5] or more employees for each working day in each of twenty or more calendar weeks in the [illegible]rent or preceding calendar year: *Provided*, That [illegible] to June 30, 1968, employers having [illegible]y employees shall not be considered [illegible] **term also means (1) any agent of such a person; (2) a State or political subdivision of a State, any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.**

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.[6]

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative or employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer **except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's**

[5] Section 29(a)(1) of the Fair Labor Standards Amendments of 1974 substituted "twenty" for "twenty-five," effective May 1, 1974.

[6] Prior to the Fair Labor Standards Amendments of 1974 the Act's definition of an "employment agency" excluded "an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance."

personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

AGE LIMITATION

SEC. 12. (a)[7] The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b)[8] In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act, the prohibitions established in section 15 of this Act shall be limited to individuals who are at least 40 years of age.

(c)[9] (1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d)[10] Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

ANNUAL REPORT

SEC. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

SEC. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occuring in a State which has a law prohibiting

[7] Subsection 12(a) takes effect on January 1, 1979. Prior to the Age Discrimination in employment Act Amendments of 1978, section 12 provided in its entirety: "The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age."

[8] Subsection 12(b), which was added by the 1978 Amendments, takes effect on September 30, 1978.

[9] Subsection 12(c), which was added by the 1978 Amendments, takes effect on January 1, 1979.

[10] Subsection 12(d), which was added by the 1978 Amendments, takes effect on January 1, 1979. It is repealed on July 1, 1982.

discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 15. (a) All personnel actions affecting employees or applicants for employment *who are at least 40 years of age* **(except** *personnel actions* **with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.**

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by an individual under this section until the individual has given the Commission not less that thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f)[1] *Any personnel action of any department, agen-*

[1] Effective September 30, 1978

cy, or other entity referred to in subsection (a) of this section shall not be subject to or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section.

(g)[12] *(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.*

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

EFFECTIVE DATE[13]

SEC. 16. This Act shall become effective one hundred and eighty days after enactment, except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions.

APPROPRIATIONS

SEC. 17. There are hereby authorized to be appropriated such sums as may be necessary to carry out this Act.[14]

Approved December 15, 1967.

[12] Effective April 6, 1978.

[13] The effective date of the provisions added by the Fair Labor Standards Amendments of 1974, which are shown in bold face type, was May 1, 1974. See section 29(a) of the Fair Labor Standards Amendments of 1974. The effective dates of the provisions added by the Age Discrimination in Employment Act Amendments of 1978, which are shown in italic type, are indicated in footnotes to each provision.

[14] Section 7 of the Age Discrimination in Employment Act Amendments of 1978 amended this section by eliminating the $5 million authorization ceiling on appropriations.

ADDITIONAL PROVISIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1978 (92 Stat. 189)

[PUBLIC LAW 95-256]

[95TH CONGRESS, 2D SESSION]

An Act

To amend the Age Discrimination in Employment Act of 1967 to extend the age group of employees who are protected by the provisions of such Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Age Discrimination in Employment Act Amendments of 1978".

[Sections 2 through 4, 5(a), 6 and 7 of the Age Discrimination in Employment Act Amendments of 1978 amend the Age Discrimination in Employment Act of 1967, and are incorporated in their proper place in the Act. Where the effective dates of these amendments are not part of the Act proper, they are noted in footnotes. Section 5(b), (c) and (d) of the 1978 Amendments amend title 5 of the United States Code, and are set forth below.]

FEDERAL GOVERNMENT EMPLOYMENT

SEC. 5.[15] * * *

(b)(1) Section 3322 of title 5, United States Code, relating to temporary appointments after age 70, is repealed.

(2) The analysis for chapter 33 of title 5, United States Code, is amended by striking out the item relating to section 3322.

[15] The amendments in Section 5(b), (c) and (d) take effect on September 30, 1978.

(c) Section 8335 of title 5, United States Code, relating to mandatory separation, is amended—

(1) by striking out subsections (a), (b), (c), (d), and (e) thereof;

(2) by redesignating subsections (f) and (g) as subsections (a) and (b), respectively; and

(3) by adding after subsection (b), as so redesignated, the following new subsections:

"(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Company or the Canal Zone Government, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

"(d) The President, by Executive order, may exempt an employee from automatic separation under this section when he determines the public interest so requires".

(d) Section 8339(d) of title 5, United States Code, relating to computation of annuity, is amended by striking out "section 8335(g)" and inserting in lieu thereof "section 8335(b)".

THE EQUAL PAY ACT OF 1963 (29 U.S.C. Sec. 206(d))

THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED [1] (29 U.S.C. Sec. 201, et seq.)

An Act

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning powers.[2]

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the

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[1] This publication contains the original text of the Fair Labor Standards Act of 1938 as set forth in 52 Stat. 1060, revised to reflect the changes effected by the amendments listed in this footnote, which may be found in official text at the cited pages of the Statutes at Large.

This publication contains 52 Stat. 1060, as amended by:

(1)	The Act of August 9, 1939	53 Stat. 1266
(2)	Section 404 of Reorganization Plan No. II of 1939	53 Stat. 1436
(3)	Sections 3(c)-3(f) of the Act of June 26, 1940	54 Stat. 615
(4)	The Act of October 29, 1941	55 Stat. 756
(5)	Reorganization Plan No. 2 of 1946	60 Stat. 1095
(6)	The Portal-to-Portal Act of 1947	61 Stat. 84
(7)	The Act of July 20, 1949	63 Stat. 446
(8)	The Fair Labor Standards Amendments of 1949	63 Stat. 910
(9)	Reorganization Plan No. 6 of 1950	64 Stat. 1263
(10)	The Fair Labor Standards Amendments of 1955	69 Stat. 711
(11)	The American Samoa Labor Standards Amendments of 1956	70 Stat. 1118
(12)	The Act of August 30, 1957	71 Stat. 514
(13)	The Act of August 25, 1958	72 Stat. 844
(14)	Section 22 of the Act of August 28, 1958	72 Stat. 948
(15)	The Act of July 12, 1960	74 Stat. 417
(16)	The Fair Labor Standards Amendments of 1961	75 Stat. 65
(17)	The Equal Pay Act of 1963	77 Stat. 56
(18)	The Fair Labor Standards Amendments of 1966	80 Stat. 830
(19)	Section 8 of the Department of Transportation Act	80 Stat. 931
(20)	The Act of September 11, 1967, amending Title 5 of the U.S.C.	81 Stat. 222
(21)	Section 906 of the Education Amendments of 1972	86 Stat. 235
(22)	The Fair Labor Standards of 1974	88 Stat. 55
(23)	The Fair Labor Standards of 1977	91 Stat. 1245

The original text of the Fair Labor Standards Act of 1938, as revised by the amendments through 1960, is set in the "Century" type face. Added or amended language as enacted by subsequent amendments is represented by several different typefaces as follows:

Amendments	*Typeface Used*	*Public Law*	*Date Enacted*	*Statute Citation*
Pre-1961	Century			
1961	**Century Boldface**	**87-30**	**5/5/61**	**75 Stat. 65**
1966	*Century Italics*	*89-601*	*9/12/66*	*80 Stat. 830*
1973	***Century Boldface Italics***	***93-259***	***4/8/74***	***88 Stat. 55***
1977	Helvetica Light	95-151	11/1/77	91 Stat. 1245

In cases where annual changes are to be made in provisions, as in the case of the gradual phase-out of exemptions, the changes are shown immediately following the provision to which they apply and are enclosed in brackets.

Changes made by the 1974 amendments are set in Century Boldface Italics. Those made by the 1977 amendments are set in Helvetica Light.

The footnotes in this revision show where changes have been made and refer to the specific amendments relied upon so that a comparison may be made with the official text.

This revised text has been prepared in the Office of the Solicitor, U.S. Department of Labor.

[2] As amended by section 2 of the Fair Labor Standards Amendments of 1949.

several States or between any State and any place outside thereof.[3]

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest or an employer in relation to an employee ***and includes a public agency,***[4] ***but does not include*** any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2) and (3), the term "employee" **means** any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, or

(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.[5]

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, ***or other activity, or branch or group thereof,*** in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.[6]

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[3] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

[4] Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to "employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence * * *."

[5] Similar language was added to the Act by the Fair Labor Standards Amendments of 1966. Those amendments also excluded from the definition of employee "any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." These individuals are now included.

[6] As amended by section 3(b) of the Fair Labor Standards Amendments of 1949.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor,[12] to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: ***Provided,*** **That the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee:** ***Provided further,*** **That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.** *In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that* ***the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.***

[Effective January 1, 1979, section 3(m) is amended by striking out "50 per centum" and inserting in lieu thereof "45 per centum".

Effective January 1, 1980, section 3(m) is amended by striking out "45 per centum" and inserting in lieu thereof "40 per centum".]

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.[13]

(o) Hours worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.[14]

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: ***Provided,*** **That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.** *For purposes of this subsection, the activities performed by any person or persons—*

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or

[12] As amended by Reorganization Plan No. 6 of 1950, set out under section 6a.

[13] Section 3(n) of the Fair Labor Standards Amendments of 1949. (The original language of section 3(n) was restored by the Fair Labor Standards Amendments of 1966.)

*gifted children, **a preschool,**[15] elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or*

*(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), **or***

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

*(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, **or employees handling, selling, o. otherwise working on goods or materials** that have been moved in or produced for commerce by any person, and which—*

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated)[16] or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2), *whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);*

(2) is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 13(a)(2), and whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than $275,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than $325,000 (exclusive of excise taxes at the retail level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not less than $362,500 (exclusive of excise taxes at the retail level which are separately stated);[17]

(3) *is engaged in laundering, cleaning, or repairing clothing or fabrics;*[18]

(4) *is engaged in the business of construction or reconstruction, or both;*[19]

(5) *is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, **a preschool,**[20] elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit);*[21] ***or***

(6) ***is an activity of a public agency.***

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for

[15] "A preschool" was added by the Education Amendments of 1972.

[16] Prior to the Fair Labor Standards Amendments of 1966, the dollar volume test for enterprise coverage (except in the case of an enterprise engaged in construction or reconstruction or one which was a gasoline service establishment) was $1,000,000. The dollar volume test was $350,000 for a construction or reconstruction enterprise, and $250,000 for a gasoline service establishment. In addition, enterprises with one or more retail or service establishments, in order to be covered, had to purchase or receive "goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more." Finally, under the 1961 Amendments, enterprises (except those engaged in construction or reconstruction, or in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, or gasoline service establishments) were covered only with respect to those establishments "which ha[d] employees engaged in commerce or in the production of goods for commerce."

[17] As added by section 3(a) of the Fair Labor Standards Amendments of 1977, effective November 1, 1977. Prior to those amendments, paragraphs (3), (4), (5) and (6) of section 3(s) were numbered (2), (3), (4) and (5), respectively.

[18] Prior to the Fair Labor Standards Amendments of 1966, the Act's minimum wage and overtime requirements did not generally apply to employees of laundry or dry cleaning establishments, even if such establishments were part of a covered enterprise, because of the language in section 13(a)(3) (since repealed) which exempted "any employee employed by an establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: Provided, that 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communication business."

[19] See footnote 16.

[20] See footnote 15.

[21] Prior to the Fair Labor Standards Amendments of 1966, the Act's minimum wage and overtime requirements did not apply to most of the establishments listed in this subsection, because section 13(a)(2)(iii), as it then read, exempted employees of a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children. Public schools were also exempt by virtue of the Act's definition of the word "employer," which, prior to 1966, excluded States and their political subdivisions.

the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. ***The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.*** Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 6(a)(1), and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employees in accordance with section 7. A violation of the preceding sentence shall be considered a violation of section 6 or 7, as the case may be.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.[22]

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

ADMINISTRATION [23]

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $36,000 [24] a year.

Excerpts From Reorganization Plan No. 6 of 1950, 64 Stat. 1263

"Except as otherwise provided [with respect to hearing examiners], there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department * * *. The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

(b) The Secretary of Labor[25] may, subject to the civil service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1949[26] as amended. The Secretary[27] may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Secretary[28] in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Secretary,[29] no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Secretary[30] shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d)*(1)* The Secretary[31] shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further

[22] As amended by section 8(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. Prior to January 1, 1978, the dollar amount was $20.

[23] Heading revised to reflect changes made by Reorganization Plan No. 6 of 1950.

[24] Executive Order 11811 of October 7, 1974.

[25] As amended by section 404 of Reorganization Plan No. II of 1939 (53 Stat. 1436) and by Reorganization Plan No. 6 of 1950 (64 Stat. 1263).

[26] As amended by section 1104 of the Act of October 28, 1949 (63 Stat. 972).

[27] See footnote 25.

[28] Ibid.

[29] Ibid.

[30] As amended by Reorganization Plan No. 6 of 1950.

[31] Ibid.

legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages *and overtime coverage* established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.[32] *Such report shall also include a summary of the special certificates issued under section 14(b).*

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate.) The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided:* That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who **in any workweek** is engaged in commerce or in the production of goods for commerce, *or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:*

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(d)[49] (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant

[32] Section 2 of the Fair Labor Standards Amendments of 1955.

[49] Subsection (d) added by Equal Pay Act of 1963, 77 Stat. 56 (effective on and after June 11, 1964 except for employees covered by collective bargaining agreements in certain cases).

to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor[71] and the industry committees.

INVESTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

SEC. 11. (a) The Secretary of Labor[72] or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Secretary[73] shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Secretary[77] shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Secretary of Labor[78] may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Secretary[79] as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

EXEMPTIONS

SEC. 13.[84] **(a) The provisions of sections 6** ***(except section 6(d) in the case of paragraph (1) of this subsection)***[85] **and 7 shall not apply with respect to—**

(1) any employee employed in a bona fide executive, administrative, or professional capacity *(including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools)*, **or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act,**

[71] As amended by Reorganization Plan No. 6 of 1950.
[72] Ibid.
[73] Ibid.
[77] Ibid.
[78] See footnotes 8 and 30.
[79] See footnote 30.
[84] Section 13 as amended by section 11 of the Fair Labor Standards Amendments of 1949; by Reorganization Plan No. 6 of 1950; and as further amended by the Fair Labor Standards Amendments of 1961, 1966, 1974, and 1977.
[85] As amended by the Education Amendments of 1972, 86 Stat. 235 at 375, effective July 1, 1972.

except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(5)*), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s).*[86] **A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;[87] or**

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center,[88] *if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year,* except that the exemption from sections 6 and 7 provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 6, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the national Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture;[89] *or*

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacean, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or

[86] Effective January 1, 1977, the Fair Labor Standards Amendments of 1974 deleted a clause at the end of this sentence which had read "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)." The $200,000 test was in effect during calendar year 1976. A $225,000 test was in effect during calendar year 1975. Prior to January 1, 1975 a $250,000 test was in effect.

[87] See section 13(g), which makes additional limitations on the applicability of the section 13(a)(2) and section 13(a)(4) exemptions to certain conglomerates.

[88] Added by section 11 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

[89] The last clause of section 13(a)(3) of the Act was added by section (11(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. See also section 13(b)(29) of the Act, as added by the 1977 Amendments.

person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; [90] *or*

(7) any employee to the extent that such employee is exempted by regulations, order, *or certificate* of the Secretary issued under section 14; or

(8) [91] any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

*(9) * * * (Repealed)*

[Note: Section 13(a)(9) (relating to motion picture theater employees) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in section 13(b)(27).]

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

*(11) * * * (Repealed)*

[Note: Section 13(a)(11) (relating to telegraph agency employees) was repealed by section 10 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption from the overtime provisions only in section 13(b)(23), which was repealed effective May 1, 1976.]

(12) any employee employed as a seaman on a vessel other than an American vessel; or

*(13) * * * (Repealed)*

[Note: Section 13(a)(13) (relating to small logging crews) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in Section 13(b)(28).]

*(14) * * * (Repealed)*

[Note: Section 13(a)(14) (relating to employees employed in growing and harvesting of shade grown tobacco) was repealed by section 9 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for certain tobacco producing employees from the overtime provisions only in section 13(b)(22). The section 13(b)(22) exemption was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).

LEARNERS, APPRENTICES, STUDENTS, AND HANDICAPPED WORKERS

SEC. 14. [117] *(a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.*

[90] Prior to the Fair Labor Standards Amendments of 1966, the section 13(a)(6) exemption was applicable to all agricultural employees. For additional changes made by the Fair Labor Standards Amendments of 1974, see footnote 67.

[91] As amended by the Fair Labor Standards Amendments of 1966 (which deleted the words "printed and" which formerly preceded the work "Published").

[117] As amended by section 24 of the Fair Labor Standards Amendments of 1974.

(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) where covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establishment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term "student hours of employment" means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an

hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

(B)[118] *If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed* six, *the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed* six—

(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate.

(D) [119] To minimize paperwork for, and to encourage, small business to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order, prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students. Such an application shall require only—

(i) a listing of the name, address, and business of the applicant employer,

(ii) a listing of the date the applicant began business, and

(iii) the certification that the employment of such full-time students will not reduce the full-time employment opportunities of persons other than persons employed under special certificates.

(c)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

[118] As amended by section 12 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977. The 1977 amendments substituted "six" for "four".

[119] Added by section 13 of the Fair Labor Standards Admendments of 1977, effective November 1, 1977.

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,

at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the producation of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor[120] issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;[121]

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary[122] issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.[123]

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES[124]

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the

[120] See footnote 30

[121] As amended by section 13(a) of the Fair Labor Standards Admendments of 1949

[122] See footnote 71

[123] As amended by section 13(b) of the Fair Labor Standards Amendments of 1949

[124] The Portal-to-Portal Act of 1947 relieves employers from certain liabilities and punishments under this Act in circumstances specified in that Act.

conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained *against any employer (including a public agency)* in any *Federal or State* court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[125] The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. **The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection** or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).[126]

(c) The Secretary[127] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of ***the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.***[128] ***The right provided by subsection (b) to bring an action by or on behalf of any employee*** to recover the liability specified in the first sentence of such subsection ***and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary.*** Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the *statutes*[129] of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.[130]

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 or on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in

[125] Amendment provided by section 1(a) of the Portal-to-Portal Act of 1947.

[126] The Fair Labor Standards Amendments of 1966 amended subsection 16(b), effective January 1, 1968, to authorize a private right of action for violations of subsection 15(a)(3) of the Act. Prior to this amendment only the Secretary of Labor was authorized to bring an action for violations of subsection 15(a)(3).

[127] See footnote 80.

[128] The provision for liquidated damages was added by the Fair Labor Standards Amendments of 1974. These Amendments also deleted the prior requirements that section 16(c) suits be brought only on the written request of the employee and if the case did not involve any issue of law which had not been finally settled by the courts.

[129] Amended by section 8(f) of the Fair Labor Standards Amendments of 1966.

[130] Section 14 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950 and the Fair Labor Standards Amendments of 1966.

a workplace to which the exemption in section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.[131]

INJUNCTION PROCEEDINGS

SEC. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).[132]

RELATION TO OTHER LAWS

SEC. 18. *(a)* No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.[135]

PART IV—MISCELLANEOUS

* * * * * *

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;*[1]

* * * * * *

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was no so filed or if his name did not so appear—on the subsequent

[131] Section 4 of the American Samoa Labor Standards Amendments of 1956, as amended by section 1(2) of the Act of August 30, 1957 (71 Stat. 514), effective November 27, 1957.

[132] As amended by section 12 of the Fair Labor Standards Amendments of 1961.

[135] The Fair Labor Standards Amendments of 1949 were approved October 26, 1949; the Fair Labor Standards Amendments of 1955 were approved August 12, 1955; the American Samoa Labor Standards Amendments were approved August 8, 1956; the Fair Labor Standards Amendments of 1961 were approved May 5, 1961; the Fair Labor Standards Amendments of 1966 were approved September 23, 1966; the Fair Labor Standards Amendments of 1974 were approved April 8, 1974; and the Fair Labor Standards Amendments of 1977 were approved November 1, 1977.

[1] As amended by section 801 of the Fair Labor Standards Amendments of 1966, 80 Stat. 830.

date on which such written consent is filed in the court in which the action was commenced.

* * * * *

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act of omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Secretary of Labor;[3]

* * * * *

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16[4] of such Act.

* * * * *

SEC. 13. DEFINITIONS.—(a) When the terms "employer", "employee", and "wage" are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

SEC. 14. SEPARABILITY.—If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 15. SHORT TITLE.—This Act may be cited as the "Portal-to-Portal Act of 1947".

Approved May 14, 1947.

* * * * *

ADDITIONAL PROVISIONS OF EQUAL PAY ACT OF 1963

(77 Stat. 56)

[PUBLIC LAW 88-38]

[88TH CONGRESS, S. 1409]

[JUNE 10, 1963]

An Act

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

[3] As amended by Reorganization Plan No. 6 of 1950, 64 Stat. 1263.

[4] The Fair Labor Standards Amendments of 1974 struck "(b)" after "section 16".

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

[Section 3 of the Equal Pay Act of 1963 amends section 6 of the Fair Labor Standards Act by adding a new subsection (d). The amendment is incorporated in the revised text of the Fair Labor Standards Act.]

EFFECTIVE DATE

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.

Approved June 10, 1963, 12 m.

SECTION 501, REHABILITATION ACT OF 1973 (29 U.S.C. 791) (Prohibitions against discrimination because of handicap in the Federal sector)

SEC. 7. DEFINITIONS.—For the purposes of this Act:

(6)(A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of titles IV and V of this Act, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. [29 U.S.C. § 706.]

SEC. 501. EMPLOYMENT OF HANDICAPPED INDIVIDUALS.—(a) There is established within the Federal Government an Inter-agency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after the date of enactment of this Act, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

(c) The Civil Service Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) The Civil Service Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Civil Service Commission under subsection (a) of this

section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the Civil Service Commission's activities under subsections (b) and (c) of this section.

(e) An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this Act, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f)(1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals. [29 U.S.C. § 791.]

SEC. 505. REMEDIES AND ATTORNEYS' FEES.—(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e–5(f) through (k)), shall be available, with respect to any complaint under section 501 of this Act, to any employer or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

(b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [29 U.S.C. § 794a.]

SEC. 507. INTERAGENCY COORDINATING COUNCIL.—There shall be established an Interagency Coordinating Council (hereinafter referred to in this section as the "Council") composed of the Secretary of Health, Education, and Welfare, the Secretary of Labor, the Attorney General, the Chairman of the United States Civil Service Commission, the Chairman of the Equal Employment Opportunity Commission, and the Chairman of the Architectural and Transportation Barriers Compliance Board. The Council shall have the responsibility for developing and implementing agreements, policies, and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistencies among the operations, functions, and jurisdictions of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of the provisions of this title, and the regulations prescribed thereunder. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section. Nothing in this section shall impair any responsibilities assigned by any Executive Order to any Federal department, agency, or instrumentality to act as a lead Federal agency with respect to any provisions of this title. [29 U.S.C. § 794c.]

APPENDIX D

EEOC's "Affirmative Action Guidelines"

federal register

FRIDAY, JANUARY 19, 1979
PART XI

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AFFIRMATIVE ACTION GUIDELINES

Technical Amendments to the Procedural Regulations

[6570-06-M]

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1608—AFFIRMATIVE ACTION APPROPRIATE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

Adoption of Interpretative Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Adoption of final Guidelines on Affirmative Action appropriate under Title VII of the Civil Rights Act of 1964, as amended.

SUMMARY: The Equal Employment Opportunity Commission wishes to encourage voluntary action to eliminate employment discrimination, and hereby publishes its final Guidelines on Affirmative Action. Proposed Guidelines were published on December 28, 1977 (42 FR 64,826) for public comment. The Commission has now analyzed those comments and taken them into consideration in preparing its final Guidelines. The Preamble, below, describes the Commission's purpose for issuing these Guidelines and explains how the issues raised by the comments have been addressed. These Guidelines clarify the kinds of voluntary actions that are appropriate under Federal law. They describe the action the Commission will take when the procedures outlined herein have been followed. By elucidating the standards for voluntary action in these Guidelines, the Commission encourages affirmative action without resort to litigation.

EFFECTIVE DATE: February 20, 1979.

FOR FURTHER INFORMATION CONTACT:

Peter C. Robertson, Director, Office of Policy Implementation, Room 4001A, 2401 E Street, N.W., Washington, D.C. 20506, (202) 254-7469, 634-7060

SUPPLEMENTARY INFORMATION:

An Overview of the Guidelines on Affirmative Action

The Equal Employment Opportunity Commission ("EEOC", "the Commission") enforces Title VII of the Civil Rights Act of 1964, as amended, ("Title VII," "the Act"), which makes it illegal to discriminate in employment on the basis of race, color, religion, sex, or national origin. The Act requires the Commission to investigate complaints and attempt to correct violations it discovers, informally and through conciliation, or, if necessary, through court action. The Act also authorizes private individuals to bring lawsuits if their complaints are not resolved to their satisfaction or within the statutory time period.

Since the enactment of Title VII of the Civil Rights Act of 1964, many employers, labor organizations, and other persons subject to the Act have altered employment systems to implement the purposes of Title VII by improving employment opportunities for previously excluded groups. Because of what Congress has called the "complex and pervasive" nature of systemic discrimination against minorities and women (see H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. 8 (1972)), these voluntary efforts often involve significant changes in employment relationships. Some of these actions have been challenged under Title VII, as conflicting with statutory language requiring that employment decisions not be based on race, color, religion, sex, or national origin considerations. Accordingly, the Commission believes it is important to announce the legal principles which govern voluntary affirmative action under Title VII and other employment discrimination laws, so that persons subject to the Act have appropriate guidance. These Guidelines constitute the Commission's interpretation of Title VII, harmonizing the need to eliminate and prevent discrimination and to correct the effects of prior discrimination with the need to protect all individuals from discrimination on the basis of race, color, religion, sex, or national origin.

Requests for guidance have been received by the Commission from persons subject to Title VII concerning the relationship between affirmative action and so-called "reverse discrimination." There is no separate concept under Title VII of "reverse discrimination." Discrimination against all individuals because of race, color, religion, sex, or national origin is illegal under Title VII. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

To clarify the relationship between affirmative action and a countervailing claim of discrimination, a new section 1608.1 of these Guidelines sets forth the historical and legislative foundation for the Commission's interpretation of Title VII. Section 1608.1(b) explains that Congress enacted Title VII in order to overcome the effects of past and present employment practices which are part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life. Congress sought to accomplish this objective by establishing a national policy against discrimination in employment and encouraging voluntary affirmative action to eliminate barriers to equal employment opportunity. It is the Commission's interpretation that appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.

It is essential to the effective implementation of Title VII that those who take appropriate voluntary affirmative action receive adequate protection against claims that their efforts constitute discrimination. The term affirmative action means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Section 1608.3 of these Guidelines identifies circumstances in which voluntary affirmative action is permissible under Title VII. When such circumstances exist, and a plan or program otherwise complies with these Guidelines, the Commission will find that there is no reasonable cause to believe that the affirmative action plan or program violates Title VII. See § 1608.10(a). In addition, § 1608.10(b) provides that where the plan or program is in writing and was adopted in good faith, in conformity with, and in reliance upon these Guidelines, the Commission will provide the protection authorized under section 713(b)(1) of Title VII to the employer, labor organization, or other person taking the action. See *EEOC v. AT&T*, 419 F. Supp. 1022, 1055, n. 34 (E.D.Pa. 1976), *aff'd*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

On December 28, 1977, at 42 FR 64826 the Commission published proposed "Guidelines on Remedial and/or Affirmative Action" in the FEDERAL REGISTER and invited comments from the public. Comments were received from almost 500 individuals and organizations. The paragraphs below summarize the major issues raised by the comments and indicate the way in which the final Guidelines address the concerns raised by the comments.

On December 11, 1978, the Commission voted to approve the Guidelines in final form. Pursuant to Executive Order 12067, the Guidelines were then distributed to all Federal agencies for their review. Comments received in this process are also reflected in the discussion below.

I. Change of Guidelines' Title

The proposed Guidelines were titled "Proposed Guidelines on Affirmative and/or Remedial Action" and the phrase "remedial and/or affirmative action" was utilized throughout the document. A number of commentators questioned the difference, if any, between remedial action and affirmative action. The term "remedial" has been

...ped because of the possible erro... implication that a violation of the law was required before affirmative action could be taken.

II. THE COMMISSION WILL PROCESS COMPLAINTS ALLEGING DISCRIMINATION AGAINST ANY AGGRIEVED PERSON

Many of the comments interpreted the Guidelines as indicating a Commission position that whites or males are entitled to less protection against discrimination than minorities or females, and that the Commission would either ignore complaints filed by whites or males, or process them in a different manner from those filed by females and minorities. The Commission maintains its position, articulated prior to *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that discrimination on the basis of race, color, religion, sex, or national origin, is prohibited under Title VII, regardless of the individual or class against whom such discrimination is directed. See, e.g., Commission Decision No. 74-31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions, ¶6404, (1973). The Commission will follow the same procedures in processing complaints filed by all individuals, regardless of their race, color, religion, sex, ...national origin.

...avoid any ambiguity on these ...s, language in the proposed ...uidelines suggesting that complaints filed by whites and males would be "dismissed" under certain circumstances has been amended. Proposed paragraph V stated that the Commission would "issue a notice of dismissal of the charge" when an affirmative action program conformed to the Guidelines' requirements. The word "dismissal" is a term of art used by the Commission in its procedural regulations to refer to all determinations other than "reasonable cause." Because its use was misconstrued in many comments, final sections have been amended by substituting the phrase "a determination of no reasonable cause" where such a finding is justified by the facts of the case.

III. CONSIDERATION OF RACE, COLOR, RELIGION, SEX, AND NATIONAL ORIGIN IN EMPLOYMENT DECISIONS

Some commentators objected to the draft Guidelines because of their belief that Title VII requires that all employment decisions be made without consideration of race, color, religion, sex, or national origin, regardless of the circumstances. This conclusion does not comport with United States Supreme Court decisions interpreting ...e VII, nor with the recent decision ...*gents of the University of California* ... *Bakke*, 98 S. Ct. 2733 (1978) (discussed infra). In the Title VII cases, the Supreme Court has called upon employers "* * * to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). See also, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Thus, the Supreme Court recognizes that persons subject to Title VII will consider race, sex and national origin in their analyses and evaluations. In addition, the Court has emphasized the concept of conciliation and voluntary action rather than litigation as the primary method of enforcing Title VII. See *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355 (1977). Voluntary action necessarily implies latitude to make a reasonable judgement as to whether action should be taken and the nature of such action.

At the same time, the Commission recognizes that considerations of race, color, religion, sex, and national origin are not permissible in other conte...s. For example, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 73 (1976), the Court held that the a...ti-discrimination principle of Title VII could be invoked by white employees as well as minority employees. No question of affirmative action was involved. The Court held that disparate treatment violated Title VII, but specifically stated that its decision did not address any issues relating to affirmative action programs. *McDonald*, *supra*, at 280, n. 8. For the reasons set forth in § 1608.1, the Commission considers that these Guidelines are consistent with the statute, the Congressional intent behind it, and the decisions of the Supreme Court.

IV. TWO DIFFERENT JUSTIFICATIONS OF VOLUNTARY ACTION: THE RELATIONSHIP BETWEEN TITLE VII AND EXECUTIVE ORDER No. 11246, AS AMENDED

A number of comments indicated uncertainty as to the relationship in the proposed Guidelines between the references to Title VII and the references to the Executive Order. These commentators apparently understood the Guidelines to mean that affirmative action required by Executive Order No. 11246, as amended, and its implementing regulations would be lawful under Title VII *only* where the contractor has a reasonable basis for concluding that such action is necessary under Title VII. The structure of the Guidelines has been changed to clarify the Commission's original interpretation that action taken pursuant to, and in conformity with the Executive order, as amended, and its implementing regulations, does not violate Title VII.

The legislative history of the Equal Employment Opportunity Act of 1972 shows that Congress repeatedly rejected limitations on affirmative action under the Executive Order, including the goals and timetables approach that had become by that time a central feature of the implementation of the Order. See, e.g., 118 Cong. Rec. 1385-1386 (1972) (remarks of Sen. Saxbe); 118 Cong. Rec. 1664-1665 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 1676 (1972) (rejecting amendment offered by Sens. Allen and Ervin that would have prohibited requirements for certain types of affirmative action, including the goals approach, under the Executive Order); 118 Cong. Rec. 4918 (1972) (rejecting amendment offered by Sen. Ervin that would have applied section 703(j) of Title VII to the Executive Order).

The Commission concludes that Congress intended to permit the continuation of the Executive Order program which required affirmative action by government contractors. The Congress which acted to allow the Executive Order program to continue would not, in the same measure, invalidate it under Title VII. The statute should be construed to avoid such a contradictory conclusion, especially where such a conclusion would undermine the expressed Congressional purpose of opening employment opportunities to minorities and women who had in the past been denied such opportunities.

In the Equal Employment Opportunity Act of 1972, Congress recognized the contractor's right to rely on affirmative action plans that had been approved under the Executive Order. See section 718 of Title VII. Furthermore, Congress in section 715 established the Equal Employment Opportunity Coordinating Council (composed of the Secretary of Labor, the Chair of the EEOC, the Attorney General, the Chair of the U.S. Civil Service Commission, the Chair of the U.S. Commission on Civil Rights, or their respective delegates) "to minimize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among * * * branches of the Federal Government responsible for the implementation and enforcement of equal opportunity legislation, orders, and policies." 42 U.S.C. 2000e-14. This coordination responsibility now rests in the Commission by virtue of 5 U.S.C. 901 et seq., as applied by Reorganization Plan No. 1 (1978), which was implemented by Executive Order 12067 (43 FR 28,967, July 30, 1978). In order to achieve the objectives of section 715 and Executive Order No. 12067, the Commission concludes that it must recognize compliance with the requirements of Executive Order No. 11246, as amended, and

its implementing regulations, as a defense to a charge that the affirmative action compliance program is discriminatory. The Commission concludes that adherence to an affirmative action compliance program approved by an appropriate official of the Department of Labor or its authorized agencies is lawful under Title VII. This interpretation thus insures that government contractors will not be subject to inconsistent standards by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.

Thus, the Commission recognizes that affirmative action by government contractors may be lawful under Title VII for either of two distinct reasons: (a) Such efforts constitute reasonable action to implement the legislative purposes of Title VII, or (b) the action was taken pursuant to, and in conformity with Executive Order No. 11246, as amended, and its implementing regulations. The Guidelines have been revised to reflect these two independent justifications for affirmative action under Title VII. A separate § 1608.5 governs affirmative action under Executive Order No. 11246, as amended.

The three step analytical process required under § 1608.4., when action is being justified under Title VII, is not necessary under § 1608.5, when action is being justified as undertaken pursuant to an approved program under Executive Order No. 11246, as amended. The circumstances in which such affirmative action is required under the Executive Order and the nature of such affirmative action are established by the Department of Labor.

V. Appropriate Steps for Taking Voluntary Action

A number of comments suggested that the Guidelines did not clearly define the steps the Commission believes are appropriate in taking voluntary affirmative action. A new § 1608.4 has been added to explain the three step process applicable to action justified under Title VII: reasonable self analysis, reasonable basis for concluding that action is appropriate, and reasonable action to correct that situation. The process set forth in § 1608.4 should be utilized to determine whether the circumstances set forth in § 1608.3 are present. Section 1608.5 covers action pursuant to Executive Order No. 11246, as amended.

VI. Reasonable Self Analysis

Some commentators requested further elaboration on the meaning of the term "self analysis." Section 1608.4(a) has been amended to make it clear that there is no single mandatory method of conducting the self analysis, and to refer to the methodology used by government contractors under Revised Order 4 as a model which employers and others may use in conducting a self analysis. Whatever method is used, the primary objective must be to determine whether the employment practices operate as barriers to equal employment opportunity.

Some commentators suggested that the Guidelines may be subject to abuse unless the self analysis is required to be in writing. The Commission believes that the protection from Title VII liability which may be available under section 713(b)(1) should only be recognized where the affirmative action plan or program has been carefully and consciously developed. Accordingly, the section 713(b)(1) defense will be recognized by the Commission only where the analysis and the affirmative action plan or program are in writing and are adopted in good faith, in conformity with, and in reliance upon these Guidelines. See §§ 1608.4(d) and 1608.10.

However, a respondent who has undertaken the analysis, self-evaluation, and development of an affirmative action plan of the type described in the Guidelines, but has not reduced the analysis and plan to writing, may assert these facts as a defense to a charge of discrimination. The analysis and plan need not be in writing because the Commission does not generally require that employer defenses be based on written documents. However, employers are encouraged to have written documentation since such written evidence would make it easier to establish that an analysis was conducted and that a plan or program exists. See § 1608.4(d)(2).

In response to comments which expressed concern that adoption of a plan or program might constitute an admission of discrimination, § 1608.4(d)(1) makes it clear that it is not necessary to state in writing the conclusion that a Title VII violation exists.

VII. The Guidelines Do Not Approve Inadequate Remedies

A number of commentators were concerned that violators of the Act could use the Guidelines and the section 713(b)(1) defense to shield themselves from liability for the underlying discrimination inadequately addressed by an affirmative action plan or program. The Guidelines do not lend themselves to this interpretation.

The proposed Guidelines stated in paragraph VII that the Guidelines were not intended to provide standards for determining whether voluntary action had fully remedied discrimination. The analysis and plan contemplated by these Guidelines will not establish whether discrimination existed before the plan was adop Furthermore, the plan cannot determine whether discrimination might take place subsequent to its adoption. In addition, the judgment as to whether affirmative action is sufficient to eliminate discrimination is a complex one which may take into account circumstances that may not have been included in the analysis which underlies the affirmative action plan. For these reasons the existence of the plan cannot provide the basis for determining whether discrimination existed, or whether the plan itself provided an adequate remedy for such discrimination. Therefore, the Guidelines state that they do not apply to a determination of the adequacy of an affirmative action plan to eliminate discrimination against previously excluded groups. Furthermore, the section 713(b)(1) defense is not involved in a determination of the adequacy of such a plan or program. Section 1608.11(a) is intended to make it clear that employers, labor organizations, or other persons who take affirmative action may still be liable under Title VII if the plan or program does not adequately remedy illegal discrimination.

VIII. No Admission of Discrimination Required

Another group of comments sta that, because the Guidelines do not require an admission or finding of discrimination, the Commission may thereby approve affirmative action which might constitute unlawful discrimination prohibited by Title VII. This interpretation is incorrect.

The proposed Guidelines stated in paragraph II that the lawfulness of affirmative action was not "dependent upon an admission, or a finding, or evidence sufficient to prove" that the person taking such action had actually violated Title VII. After careful analysis and consideration, the Commission is of the opinion that the statement, as amended, appearing in § 1608.4(b), represents an appropriate interpretation of Federal law and policy for the reasons set forth in § 1608.1(c).

These Guidelines provide a sufficient basis to determine whether affirmative action is appropriate. Persons subject to the Act should not, by taking reasonable affirmative action, be exposed to liability under the very Act they are seeking to implement. Similarly, the law should not force the employer or other person to speculate whether an arguable defense to a Title VII charge would be recognized by a court before taking affirmative ac Section 1608.4(b) makes it clear this reasonable basis exists with regard to arguable defenses to a Title VII action.

IX. The Scope of Appropriate Voluntary Action

Several comments raised questions concerning the appropriate scope of voluntary affirmative action intended by the Guidelines. Some perceive the Commission's use of the words "ratios and other numerical remedies" in proposed Paragraph IV, in addition to the words "goals and timetables", as indicating that the Commission was endorsing "absolute quotas" or "fixed quotas" without regard to qualifications or the circumstances in which they were used. The words "ratios and other numerical remedies" have been omitted from these Guidelines in order to avoid ambiguity and to make it clear that any numerical objective is subject to the availability of sufficient applicants who are qualified by proper, validated standards.

Affirmative Action under these Guidelines must be reasonable and must be related to the problems disclosed by the self-analysis. A new § 1608.4(c) has been added to make this clear. Affirmative action under these Guidelines may include interim goals or targets. Such interim goals or targets for previously excluded groups may be higher than the percentage of their availability in the workforce so that the long term goal may be met in reasonable period of time. In order to achieve such interim goals or targets, an employer may consider race, sex, and/or national origin in making selections from among qualified or qualifiable applicants. Courts have ordered actions of this kind in litigated cases and in consent decrees. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972), *en banc, cert. denied* (98 S. Ct. 3145 (1978)); *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

X. Relevance of Certain Court Cases

A number of comments indicated that there were court decisions rendering inappropriate the approach taken by the Commission in these Guidelines. Because the proposed Guidelines were issued for comment prior to the decision of the United States Supreme Court in the case of *Regents of University of California v. Bakke*, 98 S. Ct. 2733 (1978), a number of commentators suggested that either the Guidelines were inappropriate in light of the decision of the California Supreme Court in that case, or that the Commission should wait until the U.S. Supreme Court had issued its opinion. As recommended, the Commission awaited the action of the Supreme Court in that case before promulgating these Guidelines. The Commission has revised these Guidelines in light of the opinions of the Justices of the Supreme Court in *Bakke*. The Commission concludes that these Guidelines are consistent with the action of the Supreme Court in that case.

In the *Bakke* case the university did not assert reliance on any detailed guidance and procedures for crafting an affirmative action plan. These Guidelines seek to provide such guidance and thereby to establish an appropriate legal foundation for voluntary action under Title VII.

Perhaps the case most frequently cited by the commentators as conflicting with the principles articulated in the proposed Guidelines was a split decision in *Weber v. Kaiser Aluminum Corp.*, 563 F.2d 216 (5th Cir. 1977), *cert. granted*, ——U.S. ——. *Weber*, however, was decided prior to *Bakke*, and therefore did not take into account the opinions in that case. In addition, it is fundamentally unfair to expose those subject to Executive Order No. 11246 to risks of liability under Title VII when they act in compliance with government requirements or when they act voluntarily and appropriately to achieve statutory objectives. Furthermore, the clarification provided by these Guidelines is necessary because the *Weber* decision may be interpreted to unduly interfere with the range of affirmative action which Congress intended to permit under Title VII.[1]

The Commission has examined all the decisions brought to its attention in the comments and other recent decisions of the United States Supreme Court and concludes that none of these decisions affect its interpretation of the circumstances in which affirmative action is lawful under Title VII.

By virtue of the authority vested in it by section 713 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265, and after due consideration of all comments received, the Equal Employment Opportunity Commission hereby issues as new Part 1608 of Title 29 of the Code of Federal Regulations its "Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended" as set forth below.

Signed at Washington, D.C., this 16th day of January 1979.

For the Commission.

Eleanor Holmes Norton,
Chair.

Sec.

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Authority: Sec. 713 of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265.

§ 1608.1 Statement of Purpose.

(a) *Need for Guidelines.* Since the passage of Title VII in 1964, many employers, labor organizations, and other persons subject to Title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to Title VII, or as a result of conciliation efforts under Title VII, action under Executive Order No. 11246, as amended, or under other Federal, state, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of Title VII. Any uncertainty as to the meaning and application of Title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation. The Commission

[1] The Commission has taken the position that the decision of the Court of Appeals is incorrect and that the affirmative action program there was lawful. The Solicitor General has taken the same position, and the Supreme Court has now granted petitions for a writ of certiorari.

believes that it is now necessary to clarify and harmonize the principles of Title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of Title VII.

(b) *Purposes of Title VII.* Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.[1] The Legislative Histories of Title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.[2] The purpose of Executive Order No. 11246, as amended, is similar to the purpose of Title VII. In response to these economic and social conditions, Congress, by passage of Title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to Title VII (hereinafter referred to as "persons," see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See § 706 of Title VII.

(c) *Interpretation in furtherance of legislative purpose.* The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.[3] Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII. Correspondingly, Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against Title VII liability which the Commission is authorized to provide under section 713(b)(1).

(d) *Guidelines interpret Title VII and authorize use of Section 713(b)(1).* These Guidelines describe the circumstances in which persons subject to Title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with Title VII. These Guidelines constitute the Commission's interpretation of Title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to Title VII is entitled to assert that actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission," including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of Title VII.

(e) *Review of existing plans recommended.* Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See § 1608.10. Therefore, persons subject to Title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to comply with these Guidelines, and to readopt or reaffirm them.

§ 1608.2 Written interpretation and opinion.

These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-12(b)(1)), and sec. 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 55,394 (October 14, 1977)). Section 713(b)(1) provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * *

The applicability of these Guidelines is subject to the limitations on use set forth in § 1608.11.

§ 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations, and other

[1] Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963), as amended; the other Titles of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90-284, Title VIII, 82 Stat. 73, 81 (1968), as amended; the Educational Opportunity Act (Title IX), Pub. L. 92-318, 86 Stat. 373 (1972), as amended; and the Equal Employment Opportunity Act of 972, Pub. L. 92-261, 86 Stat. 103 (1972), as amended.

[2] Equal Pay Act of 1963: S. Rep. No. 176, 88th Cong., 1st Sess., 1-2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report—1975, Job Patterns for Women in Private Industry* (1977); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government—1975* (1977); United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

[3] Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., *EEOC v. AT&T*, 419 F. Supp. 1022 (E.D.Pa. 1976), *aff'd*, 556 F. 2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

ns subject to Title VII may take native action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and ...en with the opportunity, skill, ...experience necessary to perform functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30,290; 38,297; 38,299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

§ 1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable self analysis.* The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to ...rmine why. There is no mandamethod of conducting a self anal... The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, state, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable basis.* If the self analysis shows that one or more employment practices: (1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

(c) *Reasonable action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of appropriate affirmative action.* Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 38,814 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38,290; 38,300 (Aug. 25, 1978). That statement reads, in relevant part:

> When an employer has reason to believe that its selection procedures have * * * exclusionary effect * * *, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:
>
> The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;
>
> A recruitment program designed to attract qualified members of the group in question;
>
> A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;
>
> Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;
>
> The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;
>
> A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and
>
> The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of reasonable action.* In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(i) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) *Written or unwritten plans or programs.*—(1) *Written plans required for 713(b)(1) Protection.* The protection of section 713(b) of Title VII will

be accorded by the Commission to a person subject to Title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of Section 713(b)(1). The Commission will not require that there be any written statement concluding that a Title VII violation exists.

(2) *Reasonable cause determinations.* Where an affirmative action plan or program is alleged to violate Title VII, or is asserted as a defense to a charge of discrimination; the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

§ 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under Title VII, affirmative action compliance programs adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60–2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of Title VII and the Executive Order, and the Commission's responsibility under Executive Order No. 12067 to avoid potential conflict among Federal equal employment opportunity programs. Accordingly, the Commission will process Title VII complaints involving such affirmative action compliance programs under this section.

(a) *Procedures for review of Affirmative Action Compliance Programs.* If adherence to an affirmative action compliance program adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (1) Whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and (2) whether adherence to the program was the basis of the complaint or the justification.

(1) *Programs previously approved.* If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order No. 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) *Program not previously approved.* If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (i) Follow the procedure in § 1608.10(a) and review the program, or (ii) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order No. 11246, as amended, and its implementing regulations. If, the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the contractor.

§ 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.

(a) *Procedures for review of plans.* If adherence to a conciliation or settlement agreement executed under Title VII and approved by a responsible official of the EEOC is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action challenged under Title VII, the Commission will investigate to determine: (1) Whether the conciliation agreement or settlement agreement was approved by a responsible official of the EEOC, and (2) whether adherence to the agreement was the basis for the complaint or justification. If the Commission so finds, it will make a determination of no reasonable cause under § 1608.10(a) and will advise the respondent of its right under section 713(b)(1) of Title VII to rely on the conciliation agreement.

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the respondent.

§ 1608.7 Affirmative action plans o grams under State or local law.

Affirmative action plans or programs executed by agreement with state or local government agencies, or by order of state or local government agencies, whether entered by consent or after contested proceedings, under statutes or ordinances described in Title VII, will be reviewed by the Commission in light of the similar purposes of Title VII and such statutes and ordinances. Accordingly, the Commission will process Title VII complaints involving such affirmative action plans or programs under this section.

(a) *Procedures for review of plans or programs.* If adherence to an affirmative action plan or program executed pursuant to a state statute or local ordinance described in Title VII is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (1) Whether the affirmative action plan or program was executed by an employ labor organization, or person sul. ct to the statute or ordinance, (2) w ether the agreement was approved by an appropriate official of the state o local government, and (3) whether adherence to the plan or program was the of the complaint or justification.

(1) *Previously Approved Plans Programs.* If the Commission finds the facts described in paragraph (a) of this section, the Commission will, in accordance with the "substantial weight" provisions of section 706 of the Act, find no reasonable cause where appropriate.

(2) *Plans or Programs not previously approved.* If the plan or program has not been approved by an appropriate official of the state or local government, the Commission will follow the procedure of § 1608.10 of these Guidelines. If the Commission finds that the plan or program does conform to these Guidelines, the Commission will make a determination of no reasonable cause as set forth in § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) and § 1608.10(b), below, may be asserted by the respondent.

§ 1608.8 Adherence to court order.

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after cont litigation, in a case brought to en a Federal, state, or local equal emp... ment opportunity law or regulation, is

basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

§ 1608.9 Reliance on directions of other government agencies.

When a charge challenges an affirmative action plan or program, or when such a plan or program is raised as justification for an employment decision, and when the plan or program was developed pursuant to the requirements of a Federal or state law or regulation which in part seeks to ensure equal employment opportunity, the Commission will process the charge in accordance with § 1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

.10 Standard of review.

(a) *Affirmative action plans or programs not specifically relying on these guidelines.* If, during the investigation of a charge of discrimination filed with the Commission, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or program of the type described in these Guidelines, the Commission will determine whether the assertion is true, and if so, whether such a plan or program conforms to the requirements of these guidelines. If the Commission so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the Commission under section 713(b)(1). This interpretation may be relied upon by the respondent and asserted as a defense in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or program. If the Commission does not so find, it will proceed with the investigation in the usual manner.

(b) *Reliance on these guidelines.* If a respondent asserts that the action complained of was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon these Guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII; and

(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

§ 1608.11 Limitations on the application of these guidelines.

(a) *No determination of adequacy of plan or program.* These Guidelines are applicable only with respect to the circumstances described in § 1608.1(d), above. They do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination. Whether an employer who takes such affirmative action has done enough to remedy such discrimination will remain a question of fact in each case.

(b) *Guidelines inapplicable in absence of affirmative action.* Where an affirmative action plan or program does not exist, or where the plan or program is not the basis of the action complained of, these Guidelines are inapplicable.

(c) *Currency of plan or program.* Under section 713(b)(1), persons may rely on the plan or program only during the time when it is current. Currency is related to such factors as progress in correcting the conditions disclosed by the self analysis. The currency of the plan or program is a question of fact to be determined on a case by case basis. Programs developed under Executive Order No. 11246, as amended, will be deemed current in accordance with Department of Labor regulations at 41 CFR Chapter 60, or successor orders or regulations.

§ 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

If adherence to an Equal Employment Opportunity Plan, adopted pursuant to Section 717 of Title VII, and approved by an appropriate official of the U.S. Civil Service Commission, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action under Title VII, these Guidelines will apply in a manner similar to that set forth in § 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

[FR Doc. 79-2025 Filed 1-18-79; 8:45 am]

[6570-06-M]

PART 1601—PROCEDURAL REGULATIONS

Issuance of Interpretation and Opinion

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Commission is today publishing in final form a set of Guidelines on Affirmative Action (44 FR 4422), to encourage voluntary action to eliminate employment discrimination. Section 1601.33 of the Commission's regulations is being amended to reflect a new method, contemplated by these Guidelines, by which the Commission may issue an "interpretation of opinion" of the Commission within the meaning of Section 713 of Title VII of the Civil Rights Act of 1964, as amended.

EFFECTIVE DATE: February 20, 1979.

FOR FURTHER INFORMATION CONTACT:

Peter C. Robertson, Director, Office of Policy Implementation, 2401 E Street, NW., Room 4002A, Washington, D.C. 20506 (202) 254-7639.

SUPPLEMENTARY INFORMATION: The Commission's new Guidelines on Affirmative Action contemplate that in instances where a charge of discrimination has been filed and the Commission finds that the treatment complained of occurred as a result of affirmative action procedures consistent with its Guidelines on Affirmative Action, the Commission will issue a determination of no reasonable cause. This determination may contain language stating that it is "a written interpretation or opinion of the Commission" within the meaning of Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended. The respondent in such a case may rely upon this determination as a defense to any subsequent complaints of discrimination which involve similar facts and circumstances, if the subsequent actions complained of were also taken by the respondent under its affirmative action procedures.

Such language will also appear in no-cause determinations whenever the Commission finds that the action complained of occurred pursuant to an affirmative action plan adopted in good faith compliance with, and reliance

upon, the Commission's Guidelines on Affirmative Action.

The Commission's procedural regulations are accordingly revised to include this specific type of no-cause finding as a type of "written interpretation or opinion of the Commission."

Signed at Washington, D.C. this 16th day of January 1979.

For the Commission.

ELEANOR HOLMES NORTON,
Chair.

Therefore, 29 CFR 1601.33 is amended to read as follows:

§ 1601.33 Issuance of interpretation or opinion.

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or

(c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10 (a) or (b) of the Commission's Guidelines on Affirmative Action 29 CFR Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

[FR Doc. 79-3036 Filed 1-19-79; 8:45 am]

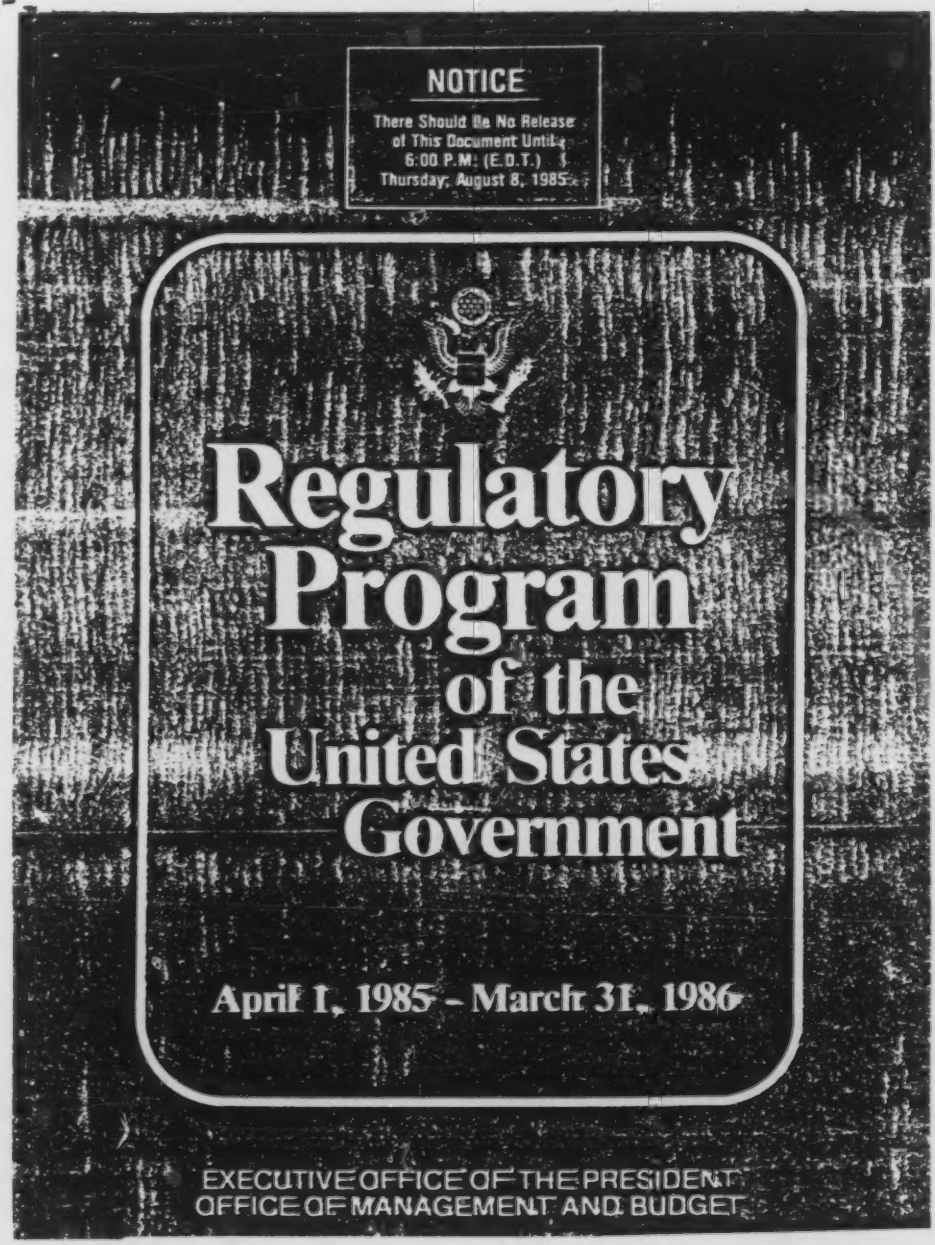
APPENDIX E

Office of Management and Budget,

Regulatory Program of the United States Government

(August 8, 1985)

(Statement of Clarence Thomas)


NOTICE
There Should Be No Release of This Document Until 6:00 P.M. (E.D.T.) Thursday, August 8, 1985
Regulatory Program of the United States Government
April 1, 1985 - March 31, 1986
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION[1]

OVERVIEW

Enforcement of the Federal laws against discrimination in employment should be guided by two principles:

1. Every complaint charging a violation of one of the laws should be investigated thoroughly and promptly, and every victim of unlawful discrimination should receive full and effective relief.
2. The laws should be enforced as they are written: every person should have equal employment opportunity, free from discrimination on the basis of race, color, religion, sex, nationrl origin, age, or (with respect to employment by Federal agencies, Federal grant recipients, and Federal contractors) handicap.

Furthermore, the Federal enforcement agencies have a responsibility to explain the antidiscrimination laws to the public clearly, so that workers and employers can understand their rights and obligations.

Unfortunately, in the past the Federal enforcement agencies pursued a very different approach. The actual victims of unlawful employment discrimination were largely ignored. Even when the EEOC found that discrimination had occurred, only rarely would it commence litigation to secure relief for the victim. In the overwhelming preponderance of cases, the Commission decided that the violation was not "litigation-worthy," and the victim was left no better off than if the antidiscrimination laws had never been enacted.

At the same time, however, the Federal enforcement agencies, including the EEOC and the Departments of Justice and Labor, turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables, and by using rigid statistical rules to define "discrimination" without regard to the plain meaning of that term. Also, although the EEOC became responsible in 1979 for enforcing the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, and section 501 of the Rehabilitation Act of 1973, it never comprehensively addressed workers' and employers' rights and obligations under any of those statutes.

As Chairman of the EEOC, I hope to reverse this fundamentally flawed approach to enforcement of the antidiscrimination statutes. Much can be, and has been, done simply through administrative actions. To the extent, however, that the existing regulatory scheme incorporates the wrong approach of the past, I intend to propose regulatory actions to correct this situation.

[1]In accordance with E.O. 12498, these materials were submitted by the Chairman of the Commission as the head of the Agency without prior review or approval by the Commission.

THOROUGH AND PROMPT INVESTIGATION OF VIOLATIONS

Turning first to the principle of thorough and prompt investigation of complaints, and full and effective relief for victims of discrimination, the EEOC has already taken major nonregulatory actions designed to achieve this goal on behalf of all employees outside the Federal government. We have adopted a "Statement of Enforcement Policy" (September 11, 1984) and a "Policy Statement on Remedies and Relief for Individual Cases of ful Discrimination" (February 5, 1985). These statements establish our intention to seek full and effective relief for all victims of unlawful discrimination. The Commission now considers all unlawful discrimination to be "litigation-worthy," and is already implementing this commitment in the private sector.

Extending this commitment to the Federal sector, however, requires regulatory action, because the procedures for investigating and resolving discrimination complaints filed by Federal employees or by applicants for Federal employment are enshrined in a nearly incomprehensible maze of regulations. The result is inordinate and utterly unacceptable delay in investigating and resolving such complaints. Moreover, even if a complainant successfully negotiates the maze and the EEOC enters a decision against an agency, the agency may disregard our decision. My goals in this area are to streamline the process and to develop an effective mechanism to ensure that Federal agencies comply with EEOC orders resolving discrimination complaints.

EQUAL EMPLOYMENT OPPORTUNITY

Turning to the principle of enforcing equal employment opportunity, and not requiring discrimination in the name of fighting it, I intend to pursue two major initiatives. First, I intend to propose a revision of the Uniform Guidelines on Employee Selection Procedures (UGESP), which were adopted in 1978 by the EEOC, the Civil Service Commission, the Department of Justice, the Department of Labor (Office of Federal Contract Compliance Programs), and the Department of the Treasury (Office of Revenue Sharing).

The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer. (For example, it is assumed that if an employer hires 60 percent of the white males who apply for employment, unless the

employer engages in unlawful discrimination it will also hire about 60 percent of the black females who apply.) UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."

The premises underlying UGESP are conceptually unsound because (1) blacks, Hispanics, other minorities, and women are not inherently inferior, and (2) statistical disparities in the rates at which an employer hires or promotes people of different races, sexes, or national origins may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination. Moreover, the use of a mechanical statistical rule to define "discrimination" encourages employers to discriminate in order to secure the work-force composition necessary to satisfy the statistical rule.

After a unanimous vote of the Commission last July, our staff began a comprehensive review of UGESP. At the conclusion of this review, I will propose to the Commission and to the consignatory agencies a revision of UGESP that will recognize that statistical disparities are not tantamount to discrimination, and that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards.

UGESP is applicable to all employers: private firms, State and local governments, and the Federal government. For Federal agencies, however, EEOC Management Directive 707 (MD-707) provides even more explicit direction to discriminate on the basis of race, sex, and national origin. Issued in the closing days of the Carter Administration (January 9, 1981), MD-707 purports to enforce the requirements of section 717 of the Civil Rights Act of 1964, as amended, that all personnel actions in the Federal government "be made free from any discrimination based on race, color, religion, sex, or national origin," and that each Federal agency "maintain an affirmative program of equal employment opportunity for all ... employees and applicants for employment." In fact, however, MD-707 requires that Federal agencies discriminate, by directing them to establish employment quotas, by race, national origin, and sex, for each of their occupational series or employment categories and organizational units, and to achieve those quotas by considering the races, sexes, and national origins of employees and applicants in making personnel decisions.

I intend to propose to the Commission a replacement for MD-707 that will not require Federal agencies to adopt quotas in any form, or otherwise to discriminate on the basis of race, sex, or national origin.

CLARIFICATION OF EMPLOYEES' AND EMPLOYERS' RIGHTS AND OBLIGATIONS

I intend to undertake at least two other significant regulatory actions designed to improve employees' and employers' understanding of their rights and obligations.

First, the current EEOC regulations implementing the statutory prohibition against employment discrimination by Federal agencies on the basis of physical or mental handicap provide inadequate guidance to the agencies. This is particularly true with respect to (1) the definition of who is a handicapped person and (2) the extent to which an agency must accommodate a handicapped person's disability. I intend to propose to the Commission comprehensive policy statements on both these questions.

Second, the existing regulations interpreting the Equal Pay Act of 1963 were issued by the Department of Labor when it was responsible for enforcing the Equal Pay Act. Upon receiving that responsibility in 1979, the EEOC stated (44 FR 38671) that while it was not adopting DOL's interpretations of the Act, employers could continue to rely upon those interpretations until the EEOC issued its own, "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

Under these conditions, the existing regulations are almost useless to employers and employees because it is almost impossible for them to know which regulations the EEOC deems effective and which it considers to have been overruled. Indeed, the continued publication of those regulations in the Code of Federal Regulations is misleading because the EEOC's 1979 "proceed at your own risk" notice is not published along with the regulations. Thus, anyone not aware of that notice might understandably think that the regulations may be relied upon in their entirety.

It is therefore imperative that the existing Equal Pay Act interpretations be rescinded. It is less clear, however, whether they should be replaced by new interpretative regulations or a general statement of enforcement policy, or whether the Equal Pay Act should be left to speak for itself. The Commission's staff is now reviewing the advantages and disadvantages of the alternatives, and I intend to make a proposal to the Commission at the conclusion of that review.

SIGNIFICANT REGULATORY ACTIONS

Prerule Stage

FEDERAL AGENCIES' AFFIRMATIVE PROGRAMS OF EQUAL EMPLOYMENT OPPORTUNITY (PREVIOUSLY USED TITLE: EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT)

Problem To Be Solved

Section 717(a) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e16(a)), provides that all "personnel actions affecting employees or applicants for employment [in the Federal government] shall be made free from any discrimination based on race, color, religion, sex, or national origin." Section 717(b) of the Act, 42 U.S.C. 2000e-16(b), requires that each Federal department and agency submit to the EEOC "a national and regional equal employment opportunity plan ... in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment."

Notwithstanding the statutory requirement that all Federal personnel actions be free from discrimination, on January 9, 1981, the EEOC issued Equal Employment Opportunity Management Directive 707 (MD-707), which requires that Federal personnel actions be based upon race, sex, and national origin. Specifically, MD-707 directed each Federal agency and department to determine whether the percentage of its employees from each race and national origin group, by sex, in each of its occupational series or employment categories, is the same as the participation rate for each race and national origin group, by sex, in the civilian labor force. Wherever any group was found to be "underrepresented," the agency or department was to set numerical "goals" for hiring and promoting members of that group, and to set aside hiring and promotion opportunities for members of such groups in order to achieve those "goals."

It is necessary to revise MD-707 in order to prevent employment discrimination by Federal agencies.

Need For Federal Solution

This Management Directive applies solely to Federal agencies and can only be revised by the EEOC.

Approach

We have identified the following questions as potential policy issues to be resolved:

1. Section 717(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(b), requires that every Federal agency "maintain an affirmative program of equal employment opportunity." What are proper elements for such a program?
2. Should Federal agencies set goals and timetables for hiring individuals on the basis of their race, sex, and national origin?
3. What action should the EEOC take if a Federal agency refuses to comply with a rule, regulation, order, or instruction issued by the EEOC pursuant to section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16)?

Alternative responses to these issues are still being identified.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Preparation of new Management Directive completed	September 1985
Consultation with other agencies, if Commission approves new Management Directive	October-December 1985
Issuance of new Management Directive if approved by Commission	January 1986

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RIN: 3046-AA12

EQUAL PAY ACT INTERPRETATIONS

Problem To Be Solved

In 1965 the Department of Labor (DOL), which was then responsible for enforcing the Equal Pay Act of 1963, issued a set of interpretations of the Act. DOL amended its interpretations in 1967.

Between 1967 and 1979, the Fair Labor Standards Act, of which the Equal Pay Act is an integral part, was amended three times. There were also a number of court decisions, including *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), rejecting or questioning aspects of the DOL interpretations. Therefore, in 1979, when the EEOC received responsibility for enforcing the Equal Pay Act, the Commission declared (44 FR 38671) that while it was not adopting the DOL interpretations, until the EEOC issued its own interpretations employers could continue to rely upon the DOL interpretations "to the extent that they are not inconsistent with statutory revisions and judicial interpretations."

The EEOC's 1979 notice is not published in the Code of Federal Regulations with the DOL interpretations. Therefore, a person reading those interpretations might mistakenly think they may be relied upon in their entirety. Moreover, the EEOC has never indicated which provisions of the DOL interpretations it considers to be "inconsistent with statutory revisions and judicial interpretations." Thus, not even employers and employees

who are aware of the 1979 notice have any reliable guidance concerning the EEOC's interpretation of their obligations and rights under the Equal Pay Act.

Need For Federal Solution

The EEOC has primary responsibility for enforcing the Equal Pay Act.

Approach

The following alternative solutions have been identified:

1. The Commission could issue new interpretative regulations. The advantages of this alternative would be that employers would have the EEOC's interpretation of the statute, the prior DOL regulations would be updated to reflect statutory changes and judicial development, and, the EEOC's interpretations would be widely disseminated and readily available to employers. Regulations would benefit the EEOC to the extent that they facilitate enforcement, employers to the extent that they facilitate voluntary compliance, and employees to the extent that compliance is more easily or quickly achieved. The regulations would not impose any costs not imposed by the statute itself.
2. The Commission could issue a statement of enforcement policy, instead of interpretative regulations. The advantage of this alternative is that employers would be apprised of the enforcement agency's interpretation. The disadvantages are that the DOL's regulations might still be in the Code of Federal Regulations and the EEOC's enforcement policy might not be as widely disseminated or readily available to employers as interpretative regulations would be.
3. The Commission could announce that the DOL regulations can no longer be relied upon without issuing anything to replace them. The advantage would be that it is the least costly alternative for the EEOC to implement. The disadvantages are that employers would not have general guidance from the enforcement agency, the agency's enforcement efforts might be slowed by case-by-case development of policy and precedent, and employees might not be aware of their rights.

New regulations would offer employers greater certainty concerning how to comply with the Equal Pay Act. Thus, they would eliminate the costs associated with the present risk of unintentional noncompliance.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Commission decision concerning whether to issue new regulations	September 1985
Publication of notice that employers may not rely upon existing regulations (if Commission decides not to issue new regulations)	November 1985
Proposed rule presented to Commission (if Commission decides to issue new regulations)	May 1986

Agency Contact

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RIN: 3046-AA07

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Problem To Be Solved

The Uniform Guidelines on Employee Selection Procedures (UGESP, 29 CFR Part 1607), which were promulgated in 1978 (43 FR 38290), define "discrimination" in employment on the basis of a mechanical statistical rule that bears no relationship to the plain meaning of that term. UGESP requires (1) that whenever there are variations beyond a narrow margin in the rates at which an employer hires or promotes people of different races, sexes, or national origins, the employer must "validate" its selection procedure(s) according to certain highly technical standards; and (2) that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment.

These regulations are founded on the premise that but for unlawful discrimination, there would not be variations in the rates of hire or promotion of people of different races, sexes, and national origins. UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral.

Considering the premises underlying UGESP, it is necessary to reexamine these regulations.

Need For Federal Solution

Enforcement of title VII of the Civil Rights Act of 1964, as amended, is a responsibility of the Federal government.

Approach

Among the potential policy issues to be resolved are the following:

1. Under what circumstances, if any, is it a violation of title VII if the percentage of applicants of any particular race, sex, or national origin hired by an employer is different from the percentage hired of any other race, sex, or national origin?
2. Under what circumstances, if any, and according to what standards, does title VII require that an employer demonstrate the validity of its employee selection procedures?

3. What records, if any, should employers be required to keep, and for how long, concerning the race, sex, and national origin of their employees, former employees, and applicants for employment?

Alternative approaches and/or solutions are still being identified.

The goal of any revision of UGESP would be to implement a more rational, effective, and efficient approach to the enforcement of title VII. Such a revision would be consistent with the Administration's regulatory principles because it would have a net benefit to society by helping to eliminate unlawful employment discrimination.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Proposed rule presented for Commission vote	February 1986

Agency Contact

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EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

Problem To Be Solved

A General Accounting Office report (GAO/FPCD-83-21, April 7, 1983) chronicled problems that were present in the system for resolving charges of unlawful discrimination filed by Federal employees or applicants for Federal employment. The EEOC has already addressed the internal management of its role in this process, but most of the problems were, and continue to be, the result of the system itself. This system's complex structure has been characterized by an inordinate length of time for processing complaints of discrimination (an average of 524 days is taken to issue final agency decisions), duplication of fact development, multiple levels of decision making, heavy involvement by respondent agencies in investigating and ruling on complaints regarding their own conduct, and inadequate mechanisms to ensure compliance with final orders issued at the completion of the process.

Need For Federal Solution

This action relates solely to employees of Federal agencies and to applicants for employment in the Federal government.

Approach

We have identified the following questions as potential policy issues to be resolved:

1. What is the most efficient process for resolving complaints of unlawful discrimination filed by Federal employees or by applicants for Federal employment?
2. What action should the EEOC take if a Federal agency refuses to comply with a final adjudication by the EEOC of a discrimination complaint filed by a Federal employee or by an applicant for Federal employment?

Alternative responses to these issues are still being identified.

This action is consistent with the Administration's regulatory principles because it will have a net benefit to society by helping to eliminate unlawful discrimination in the Federal government. In addition, it will result in more efficient and effective enforcement of the statutory prohibitions against discrimination by Federal agencies.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Proposed rule, if any, presented for Commission vote	November 1985
Publication of final rule, if any	March 1986

Agency Contact

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EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT: HANDICAP

Problem To Be Solved

The Commission is processing an increasing volume of complaints alleging handicap discrimination by Federal agencies in violation of section 501 of the Rehabilitation Act of 1973. Our review of these complaints, our communications with other Federal agencies, and the state of judicial case law on this subject matter indicate that there are at least two major issues where the Commission's existing regulations are inadequate and further guidance is necessary: (1) the appropriate definition of handicapped individuals who are protected by Federal statutes from discrimination and/or on whose behalf affirmative action is to be undertaken, and (2) the extent to which an agency must accommodate these individuals' disabilities.

The commission's regulations contain a very general definition of "handicapped person." This definition has

been subject to a wide array of interpretations. Most of these interpretations have related to the definition's use of the phrase "substantially limits one or more major life activities" in describing the nature of the physical or mental impairment that brings a person within the definition. The regulations also require that Federal agencies provide reasonable accommodation to otherwise qualified handicapped applicants and employees, but provide little guidance beyond listing some of the factors that should go into deciding whether a particular accommodation is reasonable and would not impose an undue hardship on the operations of the agency.

Need For Federal Solution

The elimination of handicap discrimination in Federal employment is a uniquely Federal responsibility based upon Federal statutory authority.

Approach

The Commission could amend its regulations on handicap discrimination to clarify the definition of "handicapped person" and/or the extent of required accommodations. Alternatively, the Commission could issue interpretative guidelines, such as management directives, that would provide guidance on the proper interpretation of existing regulatory language. Another alternative would be to disseminate Commission decisions in individual cases actively and systematically, in order to allow other agencies to draw their own conclusions from the Commission's reasoning. Of course, various combinations of these three sorts of actions are also possible.

Amending the regulations probably would entail the most administrative costs in time, money, and resources, while disseminating Commission decisions would entail the least. Conversely, amended regulations would carry the most weight, and decisions the least, in the sense of the likelihood of the guidance being noticed and followed and thereby achieving the desired benefits of less discrimination and better, more efficient decision making. None of these forms of action would impose direct costs on the public, although the costs and benefits of accommodations themselves, both to the government and to the individuals, may vary, depending on the ultimate resolutions of these issues.

The ultimate objective of whatever alternative the Commission undertakes will be to improve the performance of the Commission and other Federal agencies in fulfilling their civil rights responsibilities. The reduction in ambiguity and the uncertainty it spawns is expected to permit more efficient prosecution of these responsibilities. Improved guidance may prevent or reduce the need for using the long and expensive complaint processing systems. Also, if successful in the Federal sector and applied to the statutes conditioning Federal grants and contracts, this sort of guidance might reduce existing disincentives to dealing with the Federal government.

Next Steps

Legal deadline: None.

Milestones:

Action	*Date*
Publication of proposed rule, if any	January 1986

Agency Contact

Richard Komer
Special Assistant to the Chairman
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20507
(202) 634-6700

RIN: 3046-AA23

APPENDIX F

EEOC's "Statement of Enforcement Policy" (September 11, 1984)

and

"Policy Statement on Remedies and Relief for Individual Victims of Unlawful Discrimination" (February 5, 1985)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

September 11, 1984

MEMORANDUM

TO : Johnny Butler
General Counsel

Odessa Shannon
Director, Office of Program Operations

FROM : Clarence Thomas
Chairman

Tony E. Gallegos
Commissioner

William A. Webb
Commissioner

Fred W. Alvarez
Commissioner

SUBJ : Statement of Enforcement Policy

The Commission believes that two critical features of an effective law enforcement program are certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. Those critical features have never been fully developed by this law enforcement agency. The Commission believes that Commission employees, charging parties and respondents should understand that the Commission has adopted the goal of pursuing through litigation each case in which merit has been found and conciliation has failed. The achievement of that degree of certainty and predictability in enforcement requires a unity of purpose on the part of all segments of the Agency. The purpose of this memorandum is to articulate this enforcement policy and to direct that you develop those mechanisms necessary to more effectively integrate and allocate the Commission's legal and investigative resources so that this agency can achieve that degree of certainty and predictability in enforcement which will more directly carry out our law enforcement responsibilities.

In support of this goal, the Commission has determined that every case in which the District Director has found that one of our statutes has been violated should be submitted to the Commission

for litigation consideration if attempts at conciliation fail. In the implementation of this law enforcement policy, the Commission believes that the following points need to be clearly understood:

(1) The Commission will review for litigation consideration all reasonable cause determinations and all letters of violation where conciliation has failed;

(2) The reasonable cause determination or letter of violation requires input by the Agency's legal staff before the determination is made;

(3) The District Director is responsible for issuing all letters of determination and letters of violation. In so doing, the District Director will give serious consideration to the analysis, guidance and recommendation of all those providing input including the Regional Attorney.

(4) One finding of discrimination is no more "worthy" of litigation than any other finding of discrimination. Accordingly, the Commission believes that an enforcement philosophy or operational system which attempts to determine which among several meritorious findings is "worthy" of governmental resources is inconsistent with our statutory obligations. The National Litigation Plan is designed to focus attention on additional areas of special concern for litigation consideration. It should not be interpreted as a limitation on the consideration of meritorious litigation proposals which may fall outside the defined parameters of the National Litigation Plan.

The Commission, in support of these principles, directs the Offices of the General Counsel and Program Operations to develop jointly, for approval by the Commission, the appropriate administrative mechanisms which will implement the following procedures:

(1) The advice of attorneys should be sought, as appropriate, during the investigative process for all cases.

(2) Before the issuance of a reasonable cause determination or letter of violation, the District Director shall obtain from the Regional Attorney

an analysis of whether the evidence supports such a finding in accordance with the following standard:

> It is more likely than not that the Charging Party(s) and or members of a class were discriminated against because of a basis prohibited by the statutes enforced by the Equal Employment Opportunity Commission. The likelihood that discrimination occurred is assessed on evidence that establishes, under the appropriate legal theory, a prima facie case. If the Respondent has provided a viable defense, evidence of pretext should also be assessed.

If the Regional Attorney is of the view that the evidence does not support such a reasonable cause finding or letter of violation the Regional Attorney shall specify in writing to the District Director the reasons therefor and those reasons shall be transmitted to the General Counsel for review following failure of conciliation.

(3) The District Director, after considering the Regional Attorney's recommendation, shall:

a. Issue a determination of reasonable cause or letter of violation; or

b. Obtain additional evidence; or

c. Issue a finding of no reasonable cause or other appropriate closure.

(4) Following the failure of conciliation in every case where a reasonable cause determination or letter of violation has been issued, the District Director shall forward the case to the Regional Attorney. The Regional Attorney shall then forward such information as required by the General Counsel to the Office of General Counsel (Headquarters) for review and submission of a presentation memorandum to the Commission, through the Executive Secretariat. The General Counsel's submission shall include:

a. The General Counsel's recommendation and any additional legal analysis;

b. The Letter of Determination or Letter of Violation;

c. The Investigative Memorandum;

d. The Respondent Position Statement (or an indication that such a Position Statement does not exist);

e. Notice of Conciliation Failure where applicable; and

f. Copy of the proposed complaint.

The Commission expects that each required analysis shall be succinct and completed in an expeditious manner.

Please ensure that all employees receive a copy of this Memorandum.

Approved By the Equal Employment
Opportunity Commission February 5, 1985

POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices.

Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;

(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) Notice Requirement

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or is conciliating, or which the Commission or a court has found to have occurred. 1/

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court. 2/

1/ For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

> "XYZ, Inc. will not refuse to hire employees on the basis of their sex;
>
> "XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and
>
> "XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission."

2/ For example, employees could be notified of the relief obtained in the following way:

> "XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position.
>
> "XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."

(2) Corrective, Curative or Preventive Provisions

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices. These and any other appropriate measures, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) Nondiscriminatory Placement

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of respondent's employees ("Nondiscriminatory Placement"). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the repondent to demonstrate a contention that post-discrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the

respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) Backpay

Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Interest should be computed on all Net Backpay Due. Net Backpay Due accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation Provisions

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent

> might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

APPENDIX G

Washington Post Article on Goals and Timetables

EEOC Drops Hiring Goals, Timetables

Antibias Practice Ends Without Vote

Washington Post, Feb. 11, 1986

By Howard Kurtz
Washington Post Staff Writer

The Equal Employment Opportunity Commission, without any vote or public announcement, has abandoned the use of hiring goals and timetables in settlements with private employers accused of race and sex discrimination.

While the Reagan administration is mired in a six-month-old debate over a Labor Department program that sets such goals and timetables for federal contractors, the EEOC has dropped the longstanding practice. Top EEOC officials have justified their switch with the same argument that Attorney General Edwin Meese III has used to criticize the Labor Department's program, charging that numerical hiring goals amount to discriminatory quotas.

Johnny J. Butler, EEOC's acting general counsel, said he told the agency's regional enforcement attorneys last fall that they should no longer submit proposed settlements involving hiring goals and timetables. Butler said he was carrying out the wishes of a majority of the EEOC's five commissioners, although they have adopted no formal policy on the subject.

"As a practical matter, there are at least three commissioners who are opposed to the use of quotas," Butler said, using the term interchangeably with goals and timetables. "All three of them have said, 'Johnny, you shouldn't be bringing any more quota cases.' "

EEOC Chairman Clarence Thomas said the de facto policy has been in effect for about a year as the commission considers proposed legal settlements.

"Should a consent decree with goals and timetables come before the commission, it doesn't have the votes," Thomas said. "They simply don't get approved.

"I've been called everything from anti-civil rights to Uncle Tom for having taken a different stand," Thomas added. But he said he still

See EEOC, A8, Col. 4

EEOC Drops Goals and Timetables

EEOC, From A1

believes that hiring goals "denigrate an entire class of people."

Thomas said he will put the new policy before the full commission, but could not say when. "It is not a burning issue with me," he said.

Five members of Congress, led by Rep. Augustus F. Hawkins (D-Calif.), chairman of the House Education and Labor Committee, have criticized the EEOC for reversing its policy without public notice. They said in a recent letter to Thomas that this is "inconsistent with the commission's own affirmative-action guidelines" and "will send a conflicting and confused message to private employers."

"The commission is forfeiting the most effective tool to combat centuries of discrimination against women and minorities," said the letter, which was also signed by Reps. Barney Frank (D-Mass.), Don Edwards (D-Calif.), Patricia Schroeder (D-Colo.) and Matthew G. Martinez (D-Calif.).

President Reagan has not decided whether to revise a 20-year-old executive order on affirmative action for government contractors because his Cabinet has been split by the issue. Sixty-nine senators and 180 House members have urged Reagan not to tamper with the Labor Department program.

At the EEOC, goals and timetables have been used frequently since the early 1970s, when they were included in nationwide consent decrees covering large segments of the steel and trucking industries. Such goals became "a standard practice" during the Carter administration, Butler said.

"Finding individual victims is often an impossible and fruitless task. Nobody tells you they're not hiring you because of your race."

—Barry L. Goldstein of the NAACP

Little changed during Reagan's first term, but the shift became clear last year. In a case involving New York sheet-metal workers, the EEOC joined the Justice Department in urging the Supreme Court to strike down minority hiring targets the commission had previously supported.

Last fall, the EEOC signed a consent decree settling sex discrimination charges against Macmillan Publishing Co. But the decree specified that "the EEOC takes no position" on a provision involving hiring goals, "and will not participate in its enforcement."

Another proposed consent decree with detailed minority hiring goals, signed by Schnuck Markets of St. Louis, has been awaiting commission approval since August, according to EEOC sources. They said no reason has been given for the delay.

Under Thomas, who is seeking reappointment this summer, the commission has moved away from sweeping, industrywide lawsuits and is concentrating on individual cases that rely less on hiring statistics. Barry L. Goldstein of the NAACP Legal Defense Fund criticized this approach, saying that "finding individual victims is often an impossible and fruitless task. Nobody tells you they're not hiring you because of your race."

APPENDIX H

Letters to EEOC Regarding Goals and Timetables

Congress of the United States
Washington, DC 20515

December 6, 1985

Mr. Clarence Thomas, Chairman
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Dear Mr. Chairman:

As you know, we and other members of Congress have expressed concerns regarding the Equal Employment Opportunity Commission's (EEOC) recent policies and practices ostensibly undertaken to enforce Title VII of the Civil Rights Act of 1964, inter alia. In light of these concerns, we have conducted oversight hearings and requested that the General Accounting Office conduct a comprehensive audit of the EEOC's operations.

Recently we learned that there is an additional cause for concern: that Mr. Johnny Butler, the Acting General Counsel of EEOC, has orally instructed the Regional Attorneys not to utilize goals and timetables in securing relief for persons suffering from unlawful employment discrimination. In so doing, the Commission is forfeiting the most effective tool to combat centuries of discrimination against women and minorities.

You are doubtless aware that the above-stated action by Mr. Butler is inconsistent with the Commission's own Affirmative Action Guidelines 29 C.F.R. Sec. 1608.4 (c) (1) (1985) which permit the use of goals and timetables to remedy the effects of past discrimination. These guidelines directly incorporate many of the principles enunciated by the Supreme Court in the Weber decision. Prohibiting Regional Attorneys from seeking goals and timetables in Commission-initiated cases will send a conflicting and confused message to private employers who rely on the EEOC for guidance in fashioning their own affirmative action plans.

The Acting General Counsel's recent action raises ethical considerations under the Code of Professional Responsibility, Disciplinary Rule 7-101, which pertains to a lawyer's responsibility to represent a client zealously. EEOC is statutorily authorized and responsible for representing those who seek redress from employment discrimination, and as counsel for such persons, EEOC's attorneys would appear to be, in our view, bound by the Code to seek all available relief including goals and timetables.

This action also flies in the face of previous EEOC pronouncements in support of goals and timetables. We refer you to the EEOC's arguments in the Williams v. City of New Orleans case, in which Judge Wisdom, in his dissenting opinion, 729 F.2d 1554, 1572 n. 5 (5th Cir. 1984), referred to the Commission's

brief. Moreover, this action blatantly ignores the fact that every U.S. Court of Appeals which has addressed the validity of goals and timetables after Memphis Firefighters v. Stotts has upheld such affirmative action remedies.

Please inform us as to the basis upon which Mr. Butler's action was taken. If he acted upon a policy statement set forth in a written document and endorsed by the Commission, please provide us with a copy of such document. Please also provide us with a copy of all internal memoranda relating to or leading to this decision to abandon the use of goals and timetables. If the Acting General Counsel has acted in the absence of an articulated policy adopted by the Commission as a whole, we strongly urge that the Commission order Mr. Butler to immediately rescind his directive to the Regional Attorneys regarding the use of goals and timetables.

It is ironic that while the Commission boasts of its "tough and thorough" litigation efforts, it casts aside one of the most effective remedies for eliminating employment discrimination. Moreover, Chairman Thomas, it is troubling to see that while the Justice Department is relentlessly attempting to undercut Executive Order 11246, which, by virtue of its implementing regulations containing goals and timetables, has been proven to be effective in promoting equal employment opportunity, the Commission is apparently attempting to undermine Title VII and thereby, the dreams and aspirations of millions of women and minorities. We hope that your response to the above-stated inquiry will prove that our concerns are unfounded.

Sincerely,

Augustus F. Hawkins

Matthew G. Martinez

Patricia Schroeder

Barney Frank

Don Edwards

cc: Tony E. Gallegos, Commissioner
William W. Webb, Commissioner
Fred A. Alvarez, Commissioner
R. Gaull Silberman, Commissioner
Johnny Butler, Acting General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

JAN 31 1986

Honorable Augustus F. Hawkins
House of Representatives
Washington, D.C. 20515

Dear Congressman Hawkins:

In your letter, dated December 6, 1985, you asked about the basis for the Acting General Counsel's statement to regional attorneys concerning the use of goals and timetables in connection with litigation on behalf of the Commission. Please be advised that the statement was made pursuant to the Acting General Counsel's authority to conduct litigation on behalf of the Commission (see Section 705(b) of Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-4(b)) and his interpretation of the general direction of Commission policy.

Although the exact parameters of the General Counsel's authority to conduct litigation has not been addressed by the Commission, in our opinion, the Acting General Counsel has acted within the scope of his statutory authority to conduct Commission initiated litigation. We also believe that the Acting General Counsel's exercise of his litigation authority is not inconsistent with the proper exercise of professional judgment as defined by the Code of Responsibility, Commission policy or the Commission guidelines, cited in your letter, which permit but do not require the use of goals and timetables.

Sincerely,

Clarence Thomas
Chairman

Congress of the United States
Washington, DC 20515

January 23, 1986

Honorable Clarence Thomas
Chairman
Equal Employment Opportunity Commission
2401 E Street, N. W.
Washington, D.C. 20506

Dear Mr. Chairman:

It has come to our attention that the Equal Employment Opportunity Commission signed the consent decree in the case of June Meyer, et al. v. Macmillan Publishing Co., Inc., 78 Civ. 2133 (MEL) (S.D.N.Y.) on December 12, 1985. This settlement agreement contains language which we find very troubling. Most troubling is Section VII of the Order Regarding Preliminary Approval of Consent Decree (p. 8) which states:

> The EEOC takes no position with regard to Section VII of this Decree pertaining to goals, and will not participate in its enforcement.

We also understand that in similar cases where respondent-employers insist on including affirmative action goals and timetables as part of settlement agreements, EEOC will insist upon language such as the above in the agreements.

As Members of Congress who chair committees or subcommittees that have oversight responsibility and/or interest in the Equal Employment Opportunity Commission, we strongly object to this policy regarding goals and timetables for the reasons given in our letter of December 6, 1985, particularly in light of the fact that the language contravenes EEOC's current affirmative action guidelines, 29 C.F.R. Sec. 1608.4(c)(1) which allow the use of goals and timetables to remedy the effects of discrimination. As you know, affirmative action remedies have also been long upheld by the U.S. Supreme Court and by lower federal courts. Moreover, this action appears to reflect a policy regarding goals and timetables which has not been formally adopted by the Commission as a whole. If this is the case, we strongly urge that the Commission refrain from incorporating such language in future settlement agreements until a formal policy has been adopted. If the Commission has taken a vote with respect to goals and timetables, please inform us as to the date on which such vote was taken.

We are also requesting that you send a list of every other case, including all settlement agreements proposed or signed, in which language similar to that contained in the above consent decree was or is intended to be included. When providing this information, please state the case name, number, and if an agreement has been signed by the Commission, the date signed. In each case, please set forth the reasons for taking such action regarding goals and timetables.

Lastly, we have not yet received a response to our letter dated December 6, 1985, regarding Acting General Counsel Johnny Butler's instructions to Regional Attorneys that they are not to utilize goals and timetables in seeking relief for employment discrimination. We are sure that you understand the gravity of the concerns raised in this letter and that you will therefore respond to it and to the above requests for information by Friday, January 31, 1986.

Sincerely,

Augustus F. Hawkins

Matthew G. Martinez

Patricia Schroeder

Barney Frank

Don Edwards

AFH:sww

APPENDIX I

Consent Decree in June Meyer v. MacMillan Publishing Co., Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

JUNE MEYER, SELMA PUNDYK, AGNES HEALY and DOROTHY DUBOSE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

—and—

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor,

—against—

MACMILLAN PUBLISHING CO., INC.

Defendant.

X

78 Civ. 2133 (MEL)

ORDER SETTING HEARING FOR APPROVAL OF CONSENT DECREE

Upon the joint application of the parties, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for tentative approval of a Consent Decree entered into by plaintiffs, the defendant, and the plaintiff-intervenor Equal Employment Opportunity Commission, and the District Court having considered the proposed terms of the settlement and good cause having been shown;

IT IS on this 12th day of December 1985;

(1) ORDERED, that a hearing is set, as below, for the approval of the proposed resolution of this action as memorialized in the Consent Decree (hereinafter referred to as the "Decree") dated December 12, 1985; and it is further

(2) ORDERED, that a final determination as to approval of the proposed settlement of this action shall be reserved by the District Court pending notice to the plaintiff class members pursuant to Fed. R. Civ. P. 23(e) and an opportunity for the presentation of any objections to the proposed Decree; and it is further

(3) ORDERED, that a hearing with regard to final approval of the proposed settlement shall be held before the undersigned in the United States District Court, Southern District of New York, Foley Square, New York, New York 10007 in Courtroom 905 at 9:30 a.m. on March 11, 1986, to determine whether the proposed Decree on the terms and conditions provided for in the Decree is fair, reasonable and adequate and should be approved by the Court and whether a judgment should be entered thereon; and it is further

(4) ORDERED, that notice of the proposed Decree, of the hearing thereon, and of the right to file objections to the proposed settlement shall be given to the members of the class as defined in the Decree in

the forms annexed to the Decree as Exhibit D & E; such notices to be given on or before January 5, 1986, by publication in the national and New York City editions of The New York Times and the Daily News and by first class mailing not later than January 5, 1986; and it is further

(5) ORDERED, that the notice specified above meets the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process, and is the best practical notice under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto. Proof of publication and mailing must be filed in affidavit form with the Clerk of this Court at least two weeks prior to the final approval hearing by a representative of the defendant, duly charged with the responsibility of effectuating the notice requirement; and it is further

(6) ORDERED, that any class member who wishes to object to approval of the proposed settlement must file her objections in writing (together with copies of any and all other papers she may wish to present in support of her objection) by mailing or delivering such papers to the Clerk, United States District Court, Foley Square, New York, New York 10007 with the following notation on the envelope (Macmillan Publishing Co., Inc.—Title VII). A copy of any objection and supporting papers must also be delivered or mailed at the same time to plaintiffs' counsel, Judith P. Vladeck, Esq., Vladeck, Waldman, Elias & Engelhard, P.C., 1501 Broadway, Suite 800, New York, New York 10036, and to defendant's counsel, Gregory K. Hiestand, Esq., Epstein Becker Borsody & Green, P.C., 250 Park Avenue, New York, New York 10177, and to the Equal Employment Opportunity Commission, 90 Church Street, New York, New York 10007, Attention: Deborah Reik, Esq. All such objections must be postmarked or filed in person not later than February 25, 1986; and it is further

(7) ORDERED, that any class member who fails to object in the manner specified above shall not be entitled to contest the final approval of the proposed settlement and the judgment entered thereon, and shall be deemed to have waived such objection and shall be foreclosed from raising any objections she might have; and it is further

(8) ORDERED, that Sol Schreiber, Esq. is, pursuant to the request of the respective parties, to be the Special Master. He will assist in the implementation of all the terms of the Consent Decree and will hear and make recommendations on all the outstanding matters referred to in the Decree for review by the Special Master; and it is further

(9) ORDERED, that the hearing scheduled for March 11, 1986 or any adjournment thereof may be adjourned without further notice except as may be announced by the Court at such hearing, or any adjournment thereof; and it is further

(10) ORDERED, that in the event the Decree does not become effective for any reason (as provided in the Decree), the Decree shall become null and void and of no further force and effect, and shall not be used or referred to for any purpose whatsoever. In such event, the Decree and all negotiations and proceedings relating thereto shall be withdrawn without prejudice as to the rights of any and all parties, who shall be restored to their respective positions existing as of the date hereof; and it is further

(11) ORDERED, that the Court reserves the right to approve the Decree with modifications to which counsel for the parties consent and without further notice to members of the Class, and retains jurisdiction of this action to consider all further applications arising out of or connected with the proposed settlement herein.

Dated: New York, New York
December 13, 1985

SO ORDERED:

MORRIS E. LASKER

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

JUNE MEYER, SELMA PUNDYK, AGNES HEALY and DOROTHY DUBOSE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

—and—

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intenvenor,

—and—

MACMILLAN PUBLISHING CO., INC.,

Defendant.

X

78 Civ. 2133 (MEL)

NOTICE OF HEARING FOR THE APPROVAL OF CONSENT DECREE

TO: ALL WOMEN NOW EMPLOYED BY MACMILLAN PUBLISHING COMPANY, INC. AT 866 THIRD AVENUE ("866"), OR IN SALES POSITIONS AT ALL LOCATIONS, OR WHO AT ANY TIME SINCE JULY 1973 WERE SO EMPLOYED, OR APPLIED FOR EMPLOYMENT WITH MACMILLAN PUBLISHING COMPANY, INC. IN SALES POSITIONS AT ALL LOCATIONS.

RE: Settlement of Sex Discrimination and Retaliation Class Action Against Macmillan Publishing Company

You are hereby advised that the United States District Court (Hon. Morris E. Lasker) on December 12, 1985, set a hearing for the approval of a proposed Consent Decree in settlement of the above action. A copy of the Consent Decree is attached.

The Court has scheduled a hearing for March 11, 1986 to consider whether to grant final approval to the Decree, and to consider the objections of any class member to the Decree.

Please read the enclosed Decree carefully. The Decree, if finally approved by the Court, will be binding on all class members as defined therein.

If you do not object to the proposed Decree, you need take no further action at this time. Upon final approval of the Decree, you will receive any payment under the Decree for which you are eligible. If you seek benefits under the provisions set forth in section VIII B of the Decree, you must comply with the procedures set forth therein.

If you do wish to object, you must file your objections in writing (together with copies of any and all other papers you may wish to present in support of your objection) by mailing or delivering such papers to the Clerk, United States District Court, Foley Square, New York, New York 10007 with the following notation on the envelope (Macmillan Publishing Co., Inc—Title VII). A copy of any objection and supporting papers must also be delivered or mailed at the same time to plaintiffs' counsel, Judith T. Vladeck, Esq., Vladeck, Waldman, Elias & Engelhard, P.C., 1501 Broadway, Suite 800, New York, New York 10036, and to defendant's counsel, Gregory K. Hiestand, Esq., Epstein Becker Borsody & Green, P.C., 250 Park Avenue, New York, New York 10177, and to the Equal Employment Opportunity Commission, 90 Church Street, New York, New York 10007, Attention: Deborah Reik, Esq. All such objections must be postmarked or filed in person not later than February 25, 1986. Any class member may also appear either in person or through an attorney of her choice at the settlement hearing to be held at 9:30 a.m. on March 11, 1986, before the Honorable Morris E. Lasker, in the United States District Court, Southern District of New York, Foley Square, New York, New York 10007 in Courtroom 905.

The hearing on March 11, 1986 or any adjournment thereof, may be adjourned without further notice, except as is given by the Court at such hearing or any adjournment thereof.

Any class member who fails to object in the manner specified above shall not be entitled to contest the final approval of the proposed settlement and the judgment entered thereon, and shall be deemed to have waived such objection and shall be foreclosed from raising any objections she might have.

The documents which set forth the agreement of the proposed resolution, disposition and termination of these proceedings, as well as the pleadings and other papers in this action, are on file with the Clerk of the Court. These documents may be inspected during regular business hours at the Office of the Clerk, United States District Court, Southern District of New York, Foley Square, New York, New York 10007.

For further information concerning the settlement, you may write to plaintiffs' counsel, Judith P. Vladeck, Esq. or Joseph J. Garcia, Esq. of the law firm of Vladeck, Waldman, Elias & Engelhard, P.C., 1501 Broadway, Suite 800, New York, New York 10036, or to Deborah Reik, Esq., Equal Employment Opportunity Commission, 90 Church Street, New York, New York 10007. Inquiries should *not* be directed to the Court.

Dated: New York, New York
, 19

RAYMOND F. BURGHART
Clerk, United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

JUNE MEYER, SELMA PUNDYK, AGNES HEALY and DOROTHY DUBOSE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

78 Civ. 2133 (MEL)

—and—

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor,

—against—

MACMILLAN PUBLISHING CO., INC.,

Defendant.

X

CONSENT DECREE IN FULL SETTLEMENT OF CIVIL ACTION

CONSENT DECREE IN FULL SETTLEMENT OF CIVIL ACTION

I. INTRODUCTION

This action was commenced in federal district court on May 9, 1978 by plaintiffs June Meyer, Dorothy DuBose, Agnes Healy, and Selma Pundyk, as a putative class action, alleging that the defendant, Macmillan Publishing Co., Inc.[1] from mid-1973 to date discriminated against a broadly-drawn, nationwide class of all past, present and future female employees and applicants for employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"). The defendant has denied these allegations.

On January 31, 1980, the Court granted the Equal Employment Opportunity Commission's ("EEOC") motion for leave to intervene. The litigation was certified as a Rule 23(b)(2) class action on September 23, 1982. 95 F.R.D. 411. The class is composed of all of the defendant's past, present and future female employees of defendant employed at 866 Third Avenue ("866") and all past, present and future female employees in sales positions at all locations throughout the United States, for the period from July 1973 until the date this action finally terminates.[2] The class also includes unsuccessful female applicants for all sales positions from July 1973 until the date that this action finally terminates.[3]

Since the filing of this action, the parties have engaged in extensive discovery by way of interrogatories and requests for production of documents and depositions. During the course of this litigation, plaintiffs' and plaintiff-intervenor's attorneys have continued to analyze the defendant's response to their discovery requests and to other information (including comprehensive personnel data) which has been made available to them by defendant, class members, and others, and defendant has given similar scrutiny to information obtained from plaintiffs and intervenor. In addition, both sides have had the benefit of statistical analyses prepared by experts.

Plaintiffs' counsel, Vladeck, Waldman, Elias & Engelhard, P.C. (hereinafter also referred to as "class counsel"), predecessor counsel for plaintiffs, counsel for the EEOC, and counsel for the defendant have engaged in extensive discussions concerning the employment practices of defendant alleged to be in violation of Title VII. These discussions have resulted in this Decree, subject to approval of the Court, settling this action in the manner and upon the terms set forth below.

II. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action and the parties hereto. The complaint states claims which, if proven, would authorize the Court to grant relief pursuant to Title VII.

B. The Court shall retain jurisdiction to resolve all disputes that may arise hereunder during the term of this Decree.

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[1]At the time this action was filed, defendant was a separately incorporated, wholly owned subsidiary of Macmillan, Inc. Macmillan Publishing Co., Inc. is presently a division of Macmillan Inc., its parent company, and is now known as the Macmillan Publishing Company, a division of Macmillan, Inc. ("Macmillan Publishing Company" or "defendant"). This lawsuit, the class definition, and this Consent Decree ("Decree") relate only to individuals employed by or applying for sales positions with (as defined in the class definition) Macmillan Publishing Company. Neither Macmillan, Inc. nor its subsidiaries, affiliates, or other divisions are parties to this lawsuit or to this Decree. Accordingly, except as specifically provided, non-class members, including the past, present, or future employees of or applicants for employment with any entity other than Macmillan Publishing Company, are not within the ambit of the protections or benefits provided by this Decree.

[2]Except as otherwise expressly noted, when used in this Decree, the term "female employees" includes, without limitation, all women employed on the effective date of this Decree, as defined in section V hereof, by the defendant at 866, and all women sales employees at locations other than 866 throughout the United States, and those hired by defendant into such positions during the term of this Decree.

[3]Unsuccessful applicants for non-sales positions are not included in the class definition nor covered by the terms of this Decree.

III. NON-ADMISSION AND NON-DETERMINATION

This Decree does not and shall not be deemed to constitute an admission by any party as to the validity or accuracy of any of the allegations, assertions, or claims made by any other party. No findings of any kind have been issued by the Court concerning the merit or lack of merit of any of the allegations or defenses asserted by the parties.

IV. EFFECT OF DECREE

A. Except as set forth in paragraph "C" below, this Decree resolves in full any and all sex discrimination or retaliation claims under Title VII or any other applicable fair employment practice law, as of March 11, 1986, the date of the fairness hearing for this Decree, which have been or could have been advanced in this lawsuit as of that date against defendant by the EEOC or any class member,[4] including but not limited to sex discrimination or retaliation in recruiting, hiring, placement, promoting, training, transferring, job assignments, delegation of responsibilities or authority, performance evaluations, compensation, benefits or any and all terms and conditions of employment, and seeking damages, back pay or other monetary relief, benefits, injunctive, declaratory, equitable or any other relief for such alleged unlawful employment discrimination or retaliation.

B. Except as set forth in paragraph "C" below, by entering into this Decree, the EEOC and all class members hereby irrevocably waive any and all rights to initiate or pursue any action, proceeding or arbitration or seek remedies before any court, administrative agency or other tribunal, or to file any complaint or charge of employment discrimination based on sex or retaliation with regard to acts of commission or omission by the defendant arising on or before March 11, 1986, the date of the fairness hearing concerning this Decree, embraced within paragraph "A" above.

C. *Any class member who has filed and is, as of January 5, 1986, the notice date of this Decree, pursuing such matters described in paragraph "A" above in any court, administrative agency, or grievance and/or arbitration proceeding and which has not been dismissed or is otherwise time-barred, and who elects to continue to do so, shall not share in any monetary or other benefits provided by this Decree. Defendant shall mail notice to those individuals known to it to whom this section applies at their last known address. Persons making such election shall, by March 4, 1986, notify the Court that they have made such an election of remedies.* The Court may, for good cause shown, excuse such persons from making their election known on that date and class members so electing may rescind that election within two weeks after final approval of the Decree by the District Court. To avoid any question regarding the possibility or appearance of a conflict of interest or confidentiality, class counsel shall not represent such persons with respect to claims preserved under this election procedure, except as described in Section VIII C below.

V. DURATION OF DECREE

This Decree shall become effective upon the 61st day following the day on which the Court enters a final order approving this Decree, or, in the event that the final order is appealed after the final exhaustion of all possible appeals (hereinafter the "effective date"), and shall remain in effect until three (3) years after the effective date (hereinafter the "expiration date"), at which time all obligations under this Decree (except those specifically described in Section VII as continuing) shall end. If, at the expiration date of this Decree, monies committed by section VIII hereof for payments to the class, including interest accrued thereon, remain unexpended, a trustee designated to administer the funds shall distribute to prior recipients under Section VIII A of the Decree all such monies, on a proportionate basis consistent with prior payments to them, as soon as is practicable. No funds committed upon the effective date hereof shall revert to defendant.

VI. GENERAL PROVISIONS

A. This Decree is entered into on behalf of all class members, the EEOC and defendant for the purpose of resolving certain questions, issues and concerns of class members in connection with past, present and future employment practices and policies of the defendant. This Decree and all discussions had and communications made during the course of negotiations giving rise to it shall not constitute

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[4]For purposes of this Decree, class members shall include the named plaintiffs, all women who have been employees of defendant on or after June 30, 1973, but on or before the notice date of this Decree, as defined in section XVIII hereof, and any female applicants for sales positions who applied for such positions after June 30, 1973 but on or before the notice date of this Decree.

evidence of any violation of any contract, statute, law, ordinance, regulation, rule or executive order or obligation or duty in law or equity.[5] Nor may this Decree or any actions taken in the implementation thereof be admissible as evidence of discrimination or retaliation or for any other purpose in any judicial or administrative proceeding or any investigation pursuant thereto except those involving enforcement of the Decree. The entry of this Decree by the Court shall not constitute an admission by defendant, express or implied, that it has violated any contract, statute, law, ordinance, executive order, obligation, duty, regulation or rule, and this Decree shall not be interpreted or construed as constituting, implying, or containing any such admission. Defendant does not admit any past or present discriminatory or retaliatory employment practices, policies, customs, usages, or acts of commission or omission, nor does it admit that it has discriminated or retaliated unlawfully in any other respect.

It is understood that this Decree does not constitute an admission by defendant as to the validity of any allegations or assertions on the part of plaintiffs or the EEOC or any class member or female employee as to denials of equal employment opportunities, nor shall this Decree be used as evidence in support of any such allegations or assertions in any judicial or administrative proceeding or any investigation pursuant thereto. It is further understood that all of the negotiations leading up to the terms agreed to herein, and the reasons therefor, shall for the duration of this Decree be subject to the Order of Confidentiality issued by Magistrate Buchwald on January 19, 1980, as the same has been and may hereafter be supplemented or modified by the parties thereto.

It is further understood that this Decree, and the obligations incorporated herein, are entered into and will be implemented in good faith, in conformity with and in reliance upon 29 C.F.R. Part 1608, §§ 1608.6(b), 1608.10(b)(1979).

B. Defendant agrees to make available to female employees copies of the entire Decree for inspection and photocopying in offices designated by defendant for the duration of the Decree.

VII. GOALS

The EEOC takes no position with regard to, is not a signatory to, and will not participate in the enforcement of this section. The EEOC agrees that it will not challenge, collaterally attack, or otherwise oppose defendant's rights and obligations to maintain or implement the goals described herein, and it hereby waives its right to do so.

Defendant will continue its longstanding and ongoing efforts to integrate by gender its job titles, categories, and job groups, provided, further, that this Decree shall not be construed to require that defendant maintain quotas based upon sex. Defendant will continue its efforts to assure that female employees are not restricted or segregated by it to particular divisions, branches, departments, job titles, grade levels, categories, job groups or staff positions. It is understood that these efforts on behalf of female employees will be carried out in a manner consistent with defendant's applicable written Affirmative Action Plan ("AAP")[6] which has been developed in accordance with the regulations implementing Executive Order 11246, as amended.[7]

The defendant will continue to make good faith efforts to achieve the goals in its AAP concerning its female employees. The goals referenced herein are not inflexible minima or maxima, nor are they quotas of any kind, but rather are intended to reflect objectives which appear to be realistic and attainable by good faith efforts. In judging whether the defendant has exercised good faith in achieving the established goals, all of the surrounding facts and circumstances shall be considered, including, but not limited to, the

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[5]Such statutes, laws, ordinances, regulations, rules and executive orders, obligations or duties include, without limitation, 42 U.S.C. §§ 2000e-2000e-17; 42 U.S.C. §§ 1981-1985; Executive Order 11246, as amended, 30 Fed. Reg. 12319 (1965); the New York State Human Rights Law, N.Y. Exec. Law § 290; and the rules and regulations promulgated pursuant thereto. Further, the use of such terms as, *inter alia*, "underutilization" and "availability" should not be construed as an admission by the defendant that women have been or are presently being underutilized or discriminated against in any manner in violation of the aforementioned federal, state or local requirements or laws.

[6]All references to the "AAP" shall mean defendant's AAP as modified pursuant to this Decree and in a manner compatible with E.O. 11246, as amended, its implementing regulations, and in reliance upon and conformity with 29 C.F.R. Part 1608, §§1608.6(b), 1608.10(b) (1979). Wherever this Decree specifies that class counsel shall have access to the AAP, such language shall be construed to permit class counsel to review and suggest modifications of only those sections of the AAP which specifically relate to matters addressed by this Decree and the class and jobs in question.

[7]*See* 41 C.F.R. Part 60-2.

volume of business, the size of the workforce, the existence of vacancies, employee turnover, the qualifications of the employees or applicants involved, the total number of females in the relevant programs as set forth in section IX C of this Decree, the transfer of operations and the commitments set forth in defendant's AAP. Nothing in this Decree shall be construed as requiring defendant to hire or place individuals into positions for which the individual is not qualified. Any determinations for the purposes of this Decree of the underutilization of female employees shall be based upon the availability and utilization figures contained in defendant's AAP, which figures defendant shall review and revise from year to year as appropriate.

Defendant's goals, which are, and shall be in all cases, a reflection of availability, shall be reviewed and revised by defendant on an annual basis to reflect new availability figures as appropriate. If at the end of any year the percentage of female employees in any job group equals their workforce availability, as determined by comparing the availability percentages contained in the AAP, defendant's obligation to have a goal for that job group will cease for the ensuing year.

During its annual review of progress achieved in carrying out the terms of this Decree, defendant will reassess the annual goals set forth in its current AAP, and where defendant determines that there exists a change in the availability of females, defendant will adjust (or establish, if none exist) annual goals for such job groups to take into account the increased or decreased availability and will report any such new goals to class counsel.

Class counsel may review defendant's 1987 goals and underutilization determinations and on an annual basis thereafter for the term of this Decree. Defendant shall annually, upon request, provide to the EEOC and to class counsel relevant statistical and other information utilized in the revision of its AAP relating solely to its obligations under this Decree. Such data will be treated and used only in such manner as is consistent with the provisions of Section VI of this Decree and the Order of Confidentiality dated January 19, 1980, and any subsequent stipulations or orders of like purpose, as the same has been or may be supplemented or modified by the parties thereto, which is hereby incorporated into this Decree and made a part thereof. Annually, upon request of class counsel, defendant agrees to discuss its 1987, 1988 and 1989 goals with class counsel prior to the date upon which such goals become effective. Defendant shall have the right to utilize its goals after such discussions notwithstanding any disputes with class counsel, pending the resolution of such disputes, as described below.

Any disputes concerning the annual revisions of goals or defendant's good faith efforts to achieve its goals shall be resolved in the manner set forth in Section XIII. As defendant will be adopting goals on a calendar year basis, defendant's good faith effort to achieve annual goals for the third year of this Decree shall be reviewed at the end of that calendar year.

Defendant has revised its AAP for 1986 and the goals therein relevant to the scope and purposes of this Decree are specifically incorporated herein.

Nothing in this Decree shall be construed as impairing defendant's ability to comply with Executive Order 11246, as amended, and its implementing regulations, or similar federal, state, or local laws, rules, regulations, obligations or ordinances, including but not limited to its ability to recruit, hire, promote, train or transfer or otherwise undertake affirmative action with respect to minorities.

VIII. MONETARY RELIEF

Upon the effective date, the defendant agrees to provide $1,925,000 in monetary relief to class members in the manner described in this Decree (minus any amounts deducted due to one possible named plaintiff's election as described in Section VIII C below). This money shall be the exclusive source of all monetary relief for class members. Forthwith after the effective date hereof, this money shall be placed in an interest accruing fund under the control of a trustee appointed by the Court. Upon the effective date, this amount shall be divided as follows: (a) $1,712,500 is designated to provide monetary relief, as set forth in paragraph VIII A, to class members with two or more years' service with defendant as of the notice date of this Decree; (b) $37,500 is designated to provide monetary relief, as set forth in paragraph VIII B, to unsuccessful applicants for sales positions; and (c) $175,000 (minus any amounts deducted due to a possible named plaintiff election as described below) is designated to provide individual relief, as set forth in paragraph VIII C, to the named class representatives.

A. All class members who, prior to the notice date, have completed two years of service with the defendant, shall be eligible for monetary relief under this subsection. Such relief shall be computed according to the following formula: Each eligible class member will be assigned 1 point for each decade over 30 years old on the notice date; 1.5 points for each year of total service with defendant; 2 points for each year of such service from July 1, 1979 to the present; and 4 points for each year of service from July 1, 1973 through June 30, 1979. Years shall be expressed numerically, carried to one decimal place.[8]

To arrive at each eligible individual's total point score, the sum of each eligible individual's points shall be multiplied by her highest regular annual rate of salary up to April 30, 1983 as multiples of $1000, up to a maximum of $35,000. For example, multiply the sum of the points times 15.7 for an employee earning $15,749, or 15.8 for an employee earning $15,750, to arrive at the individual's total point score.[9] The dollar value of each point shall then be determined by totalling the point scores of all class members and dividing that total into the pool of monies available from the fund of $1,712,500 for that sub-class. Then, to ascertain each eligible individual's share of such monies, each individual's score shall be multiplied by the dollar value of each point. In view of the age of many of the claims, the amount of time this litigation has been pending, the high rate of available interest in recent years and the effects of inflation on monies owed during the period of time in question, each individual's share has been determined to be comprised of 35% backpay and compounded interest thereon for the remainder.

The data from which the above payments will be computed shall be provided by the parties to the trustee, who shall be responsible for making the proper allocations subject to Court approval.

B. Unsuccessful female applicants for sales positions who applied for such positions between July 1, 1973 and the notice date of this Decree are hereby notified that they may reapply for a sales position and that, if they do, their applications will be treated in a nondiscriminatory manner. Defendant shall accord no priority or special consideration to such persons but shall evaluate all reapplicants according to the same standards it applies to male sales applicants. A reapplicant who accepts a job offer will be treated the same as all other similarly situated employees for all purposes, including but not limited to compensation, promotions, delegation of authority or responsibilities, job assignments, performance evaluations, benefits, termination, or any and all terms and conditions of employment.

Plaintiffs' evidence, which defendant refutes, indicates that a maximum of fifteen (15) females were denied opportunities for sales positions by the defendant between July 1973 and December 1980 by virtue of alleged sex discrimination. Thus, monetary relief from the fund of $37,500 will be distributed on a pro rata basis to a limited number of women who applied unsuccessfully for sales positions during that period on the following basis: Individuals who believe that they are one of the fifteen unsuccessful applicants entitled to receive a payment under this section may contact class counsel no later than February 28, 1986. Class counsel shall promptly provide to such person the form appended hereto as Exhibit A, which the person shall be required to complete and promptly resubmit to class counsel. Class counsel, in consultation with the EEOC, will review each claim to determine whether the individual appears to be one of the fifteen entitled to relief under this section. Each such unsuccessful female applicant will receive a maximum of $2,500 from the fund pro rata, but in no event will such an individual receive less than $1,000 pro rata. If class counsel is unable to make such determination (e.g., because more than 37 claimants appear to be one of the 15), all the claims will be submitted to the Special Master designated by this Decree, who will review the claims and decide, on an equitable basis, the manner and to whom among the claimants the $37,500 shall be distributed. It is contemplated that no adversarial proceedings concerning the distribution of these funds shall occur.

C. As a result of having commenced this litigation in their own names and on behalf of unnamed class members, and of having borne special risks and responsibilities as class representatives over the length of this litigation, the named plaintiffs have suffered alleged discrimination different from and in addition to that experienced by other class members. In order to avoid the uncertainty, expense, and

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[8]The number of years shall be rounded to the nearest year carried to one decimal place. Thus, 1 year, five months, shall be considered 1.4 years, 1 year, six months shall be considered 1.5 years, and 1 year, seven months, shall be 1.6 years.

[9]For those eligible individuals hired between May 1, 1983 and December 27, 1983, the individual's salary at hire will be used in this formula.

further exposure of litigating their individual claims, the parties have agreed to create an additional fund of $175,000 to resolve all of the individual claims of the named plaintiffs. Such monies shall be paid to the named plaintiffs in addition to any monies paid pursuant to section VIII A. The named plaintiffs will each sign a second waiver, release and nondisclosure agreement, appended hereto as Exhibit B, in addition to the waiver required under section VIII E.

In the event that one of the named plaintiffs elects to continue to pursue her individual claim against defendant and thereby chooses not to enter into this Decree, twenty-five percent of $175,000 ($43,750) will be deducted from the fund for the named plaintiffs as well as from the total amount of monetary relief for all class members. No more than one of the named plaintiffs may make such an election. This limitation constitutes a material term of the Decree and upon any breach of this provision, defendant may, at its sole election, void the Decree in its entirety, with this dispute returning to status quo ante. Should one named plaintiff make an election under this section, defendant agrees that class counsel may, in the interest of judicial economy, represent such individual notwithstanding the proscription contained in section IV C above.

D. If the trustee fails to distribute any of the monies reserved for eligible class members upon termination of the three year period of the Decree, by reason of a failure to locate class members after proper notice and diligent efforts, the remaining monies shall be distributed as set forth in Section V of this Decree. No monies shall revert to the defendant.

E. *Release of Claims*—In order to receive monetary payments pursuant to paragraphs A, B and D above, class members shall execute a release and waiver of all rights they may have to proceed against defendant for alleged sex discrimination or retaliation based on conduct, acts or events of defendant occurring up to March 11, 1986, the date of the fairness hearing concerning this Decree. A copy of such release is attached hereto as Exhibit C.

IX. PROGRAMS

A. *Recruitment*—With respect to its recruitment policies, the defendant shall:

1. Notify all of its recruiting sources in writing of the defendant's commitment to equal employment opportunity, and request that its recruitment sources actively recruit and refer qualified female applicants for available positions.

2. Direct all media which carry the defendant's employment advertisements to include the statement that the defendant is an Equal Opportunity Employer.

3. Communicate in writing with women's organizations indicating the defendant's commitment to equal employment and affirmative action.

4. Employ women in responsible positions in the defendant's personnel department.

5. Encourage women employees to refer friends for employment with the defendant.

6. When recruiting at colleges, defendant shall make special efforts to reach women at such schools.

7. Place help-wanted ads in media of particular interest to females.

8. Encourage organizations to refer qualified female candidates for available positions.

B. *EEO Training*—The defendant will continue to provide equal employment opportunity management training and/or briefing sessions for officers and supervisors to equip them to deal in a non-discriminatory manner with subordinates and applicants, thereby effectively implementing the defendant's EEO policy. At least twice a year for each year that this Decree remains in effect, the defendant agrees to conduct workshops for senior management concerning personnel and employment related matters, which will pertain to equal employment issues.

The equal employment opportunity training and/or briefing conducted pursuant to this Decree will focus on the principles of EEO and the impact of EEO on personnel decisions affecting women in the selection, promotion, or separation process as well as in other terms and conditions of employment.

C. *Career Development*—

1. *Career Counseling.* The defendant will offer female employees career counseling under the supervision of the Personnel Director, or his or her designee. Female employees will be encouraged to discuss their career development interests and to inform the defendant of these interests. Female employees, upon their request, will be counseled concerning the nature of training and education necessary to qualify them for their career objectives.

2. *Tuition Refund Program.* The defendant agrees to maintain the availability of its tuition refund program for its employees and additionally, to maintain a program pursuant to which it agrees to solicit and maintain in its personnel department literature from various accredited institutions offering courses of special interest to female employees that would be available pursuant to the tuition refund program. The defendant agrees that female employees may be particularly interested in publishing, business, finance, editorial training, manufacturing, effective oral and written communications, project management, time management, decision making, as well as in related liberal arts and academic disciplines. Defendant agrees that such courses will normally meet with approval under the tuition refund program. Literature maintained by the defendant does not constitute an exclusive listing of accredited institutions offering courses available under the program, and by maintaining this literature, defendant does not either expressly or implicitly endorse any institution's programs over another's.

Defendant shall, twice a year, sponsor a special seminar(s) to be conducted by an individual possessing a doctorate degree or other appropriate qualifications, which seminar(s) shall concern one or more of the above-referenced topics but focusing on the special concerns of interest to women with respect thereto. Female employees shall receive reasonable notice of such seminars. Attendance at such seminar(s) shall be appropriate only for female employees of the defendant. Defendant agrees to inform class counsel of the identity of the seminar leader prior to final retention. Although the defendant shall consider the suggestions of class counsel, the final selection of the seminar leader shall be at the sole discretion of the defendant. If the number of attendees indicates that female employees fail to demonstrate a significant interest in the seminars, the parties will confer with respect to alternatives to or possible termination of this program.

3. *Seminars*—The defendant will establish a seminar program to be conducted by in-house management for its employees. Defendant will make special efforts to direct these seminars to opportunities of special interest to women. Because women may have been reluctant, for whatever reason, to seek such opportunities, defendant will make special efforts to encourage female employees to participate. Attendance at these seminars, however, will not be limited to female employees. The seminars will focus on management techniques, particularly concentrating on those procedures and policies in effect at defendant. The seminars will take place after regular working hours, and participation in the program will be voluntary. An employee's attendance in this program will be considered when evaluations and promotion decisions are made, but such attendance will not be a determining factor in connection therewith.

D. *Career Opportunity Program*—In order to foster promotional and interdepartmental transfer opportunities with Macmillan Publishing Company at 866, timely notice shall be made of all vacancies in managerial, professional and other positions with Macmillan Publishing Company at 866, except for officer positions and positions which become available through progression or in-line promotions (up to and including the level of officer) except to the extent provided below.

Except as otherwise described below, notices of vacancies other than officer positions and positions which become available through progression or in-line promotions shall be posted and made readily available within the Personnel Department and other appropriate areas selected by the defendant. The defendant shall provide access to the job summaries and appropriate additional information concerning such vacancies, and will screen and refer candidates deemed qualified to the company official involved for further interviews. The defendant agrees that, pursuant to this policy, it shall post positions vacated where the incumbent was an assistant vice-president of Macmillan Publishing Company, but only as to job function. Such positions will not, when posted, bear the title "assistant vice-president," nor will they then be officer positions. The fact that the vacating assistant vice-president was an officer shall have no bearing

on whether employees selected to fill such vacated positions will then or later be granted the designation of "assistant vice president" or "officer."

Women officers may make their interest in other positions known, on a confidential basis, by informing their division head and/or the Personnel Department of this interest.

Upon request, all individuals will be advised of the action taken on their applications and the reason therefor.

The Personnel Department shall keep all communications as herein described confidential.

On occasion, the exigencies of the business may dictate that the Company not post certain job vacancies otherwise covered by this program. The Personnel Department will be consulted in all circumstances in which the posting system will be bypassed, and the decision to bypass must be supported by, at minimum, the manager or direct supervisor of the vacant position's department or area. The defendant agrees to maintain a record with the Personnel Department explaining its justifications for so acting.

Posted vacancies will not be permanently filled until at least five (5) business days after the first posting date, unless the vacancy is filled by a person within the class definition certified in this case as described in Section I of this Decree, or except in circumstances in which the exigencies of the business require that the position be filled in less than five days. In those circumstances in which a posted position is filled in less than five days, the defendant agrees to maintain a record with the Personnel Department explaining its justifications for so acting.

X. EQUAL EMPLOYMENT POLICY

A. This Decree favors the internal resolution of disputes arising hereunder in a fair and timely manner. It is the parties' intention to encourage female employees who have complaints concerning the implementation of this Decree as it pertains to them or EEO complaints regarding alleged sex discrimination or retaliation arising during the term of this Decree related to their job, including, but not limited to, position, compensation, retaliation, benefits, discipline, and promotional opportunities, to utilize the internal procedures set forth herein. There will be no retaliation against employees who avail themselves of this process.

The Company believes in an open communications policy under which female employees who have a complaint or disagreement as described above are encouraged to attempt resolution of the problem by a frank discussion with their immediate supervisor. At all times, it is the responsibility of the female employee to bring such a problem to the attention of her supervisor, unless the employee's problem directly involves the supervisor, in which case the employee should bring the problem to the attention of the Personnel Department, within a reasonable period of time. If the problem does not directly involve the immediate supervisor, then the employee initially should attempt to resolve the problem with the immediate supervisor, and if it is not so resolved, the employee should review the problem with the Personnel Department.

The defendant will designate an individual who will attempt to resolve complaints arising hereunder during the term of this Decree. Such individual shall be an officer of the defendant, and shall have familiarity with equal employment opportunity laws. Should the employee's supervisor and/or the Personnel Department be unable to resolve the dispute to the employee's satisfaction after a reasonable period of time, and, in any event, prior to proceeding to section B, the employee shall notify such individual of the dispute. The individual so designated will attempt to resolve the dispute. The individual's decisions shall, for the purposes of the defendant's internal review of the matter, be final.

All reasonable efforts will be made to resolve the problem at the earliest stages, but it is recognized that some problems will require more complex solutions. Throughout the problem resolution process, good faith efforts by all parties will be maintained to ensure that the process is completed within a reasonable time period. No record of the use of this procedure will be retained in the employee's personnel file unless the employee specifically requests that such a record be kept.

B. Should the situation described in section A above remain unresolved after 60 days following initiation of the procedure described in section A, or should the final decision of the defendant, following utilization of section A, be unsatisfactory to the employee, the female employee, class counsel or the EEOC may elect to proceed to the Special Master, who has been appointed by the Court pursuant to Fed. R. Civ. P. 53 and to whom will be referred the decision of the defendant, whether final or otherwise, pertaining to individual class members which is alleged to involve sex discrimination, retaliation, or a violation of the Decree as it pertains to them.

In addition, questions or controversies raised by class counsel and/or the EEOC involving the defendant's conduct under this Decree, or alleged breaches thereof or matters of a class nature, shall, after utilization of the procedures described in section XIII, be likewise referred to the Special Master under Fed. R. Civ. P. 53.

The Special Master shall issue a report and recommendation on all matters referred to him, which either side may appeal to the Court. The Special Master, in conducting proceedings on the complaint and issuing a report and recommendation, shall be limited to the facts, the provisions of this Decree, and applicable federal law and judicial precedent under Title VII. Recommendations for an appropriate remedy may be submitted to the Special Master by the defendant and the complainant under this section and in any other proceeding before the Special Master.

A reasonable compensation to be allowed the Special Master shall be fixed by the Court and shall be charged as described in Section XX of this Decree. The parties have agreed that the Special Master for the duration of this Decree shall be Hon. Sol Schreiber, who has assisted the parties in resolving this dispute.

If a class member files a complaint under this section, she shall be precluded from processing the same or a related complaint in any court or administrative body, but she will not have to withdraw the complaint from the other forum(s) until and unless the complaint is filed with the Special Master as described above.

XI. DISSEMINATION OF POLICY

The defendant shall refer to its EEO policy in the appropriate internal media.

XII. PERFORMANCE APPRAISAL PROCEDURES

The existing performance appraisal procedure shall be continued. The employee's performance shall continue to be evaluated with appropriate opportunity allowed for employee and evaluator comments.

XIII. MONITORING

It is recognized that disputes may arise in the implementation of this Decree. In the event that no satisfactory resolution is achieved within the defendant's internal procedures, if applicable, the EEOC or plaintiffs' counsel shall, after investigation, confer with counsel for the defendant in an effort to resolve the problem. In the event that plaintiffs' counsel or the EEOC requests documents as part of their investigation, defendant shall consider such request and promptly provide such documents as it agrees are necessary for the investigation. Should the parties be unable to agree on what documents are necessary or should the parties be unable to resolve any differences herein following good faith discussions, the issue will be referred to the Special Master, as provided in Section X B. herein.

XIV. HARASSMENT OR RETALIATION

The defendant agrees that it shall not harass or retaliate against any class member because of her participation in this litigation or in the formulation of this Decree, and that such participation shall have no adverse effect upon any person's promotional opportunities, salary, treatment or personnel record, pension rights, or any other term or condition of employment. Nothing in this Decree shall restrict the defendant's right to discipline employees, including termination of employment, in any manner consistent with the law.

XV. CONFIDENTIALITY AND NONDISCLOSURE OF PROVISIONS OF AGREEMENT, REPORTS AND RECORDS

Any and all documents of any kind or description which are or have been designated, marked or identified by the parties as containing confidential, proprietary or trade secret information ("confidential matter"); personnel information, the disclosure of which would constitute a clearly unwarranted invasion

of personal privacy ("personnel information"); reports to be furnished by the defendant; and all records the defendant maintains pursuant to this Decree, shall not be disclosed by class counsel or the EEOC or to any person other than to those individuals described in the Order of Confidentiality dated January 19, 1980, as the same has been and may hereafter be supplemented or modified by the parties hereto, who shall also be barred from disclosure. Copies of this Decree and other documents which form part of the public record in this proceeding shall not be affected by the prohibition against disclosure set forth in this Section.

The class members and the EEOC agree that during the term of this Decree, they, collectively and individually, will not violate any of the confidences entrusted to them or obtained by them pursuant to this Decree or in connection with its implementation, nor reveal to any persons outside of defendant any of its operations or practices (including confidential matter or personnel information), client lists, or trade secret information which they may acquire pursuant to this Decree or in connection with its implementation.

Further, all computer tapes and microfilm in the possession of class counsel or the EEOC that were supplied during settlement discussions or in any other discovery proceeding or pursuant to this Decree will, upon the expiration of this Decree, be returned to the defendant. Any and all documents and all copies, extracts, and summaries prepared by the EEOC or plaintiffs' counsel of the aforesaid documents shall be destroyed by them at that time. The information contained in said documents shall not be used in any judicial or other proceedings or for any purpose except in connection with the implementation and monitoring of compliance with this Decree.

All confidential material and personnel information disclosed pursuant to this Decree or in connection with its implementation shall be retained in the exclusive possession and control of class counsel in such a manner as to preserve its confidential nature and shall be revealed only as necessary for the monitoring or implementation of this Decree and at such times pursuant to appropriate safeguards insuring the confidential nature of such information. All confidential matter and personnel information and copies or extracts thereof provided to any person by counsel, or prepared by such person, shall be returned to said counsel upon completion of the review or analysis to which such data pertains.

It is further agreed that neither the class members, the EEOC, the defendant, nor their respective counsel, shall publish, publicize or disseminate or cause or permit to be published, publicized or disseminated in any way (oral or written) information pertaining to, characterizing, arising from, or relating to the terms of this Decree, except for such materials as are part of the public record of this case. Nothing in this paragraph shall be construed as limiting the rights of class members under Rule 23 to discuss information pertaining to, characterizing, arising from, or relating to, the terms of this Decree, or to object to this Decree. Any violation of this section of the Decree or the Order of Confidentiality dated January 19, 1980, as the same has been and may hereafter be supplemented or modified by the parties thereto, shall constitute a violation of this Decree.

XVI. REPORTING

A. The defendant shall appoint a representative who shall have the responsibility for compliance with the reporting requirements under this Decree.

B. The defendant will implement the following internal system:

1. Records of applicant flow, hires, promotions, compensation, and terminations shall be monitored to make every good faith effort to ensure that the terms of this Consent Decree are carried out.

2. Progress toward meeting goals and timetables shall be measured periodically through discussions with department managers.

3. The representative referred to in subsection A of this section shall be responsible for periodically reviewing the results of efforts under this Decree with appropriate levels of management.

4. Where necessary, such representative shall communicate with senior management concerning recommendations to improve performance under the terms of the Consent Decree.

The following annual report will be provided to class counsel and the EEOC:

(a) Defendant's AAP (including goals) as it pertains to women shall be provided prior to its effective date.

(b) In connection with submission of its AAP, defendant will identify the sex of individuals hired or promoted into underutilized job categories.

(c) A log of posted jobs.

(d) Defendant will identify each instance to which the posting procedure applies but which was exempt from the job posting procedure, pursuant to section IX.D., and state the sex of the person hired and the reasons for the exemption.

(e) Defendant will make a good faith effort to compile a list of the number and sex of employees who attend the seminars described in Section IX.C.3, and shall provide class counsel and the EEOC with such list.

XVII. OFCCP INTERVENTION

In the event that the Office of Federal Contract Compliance Programs ("OFCCP"), or any court of competent jurisdiction or governmental agency, requires that any of the goals established herein be changed, such changes shall be deemed permissible amendments to this Decree and to the AAP embodied herein. However, the defendant agrees that it shall in no event lower the goals set forth herein, unless otherwise required by law as determined by a court of competent jurisdiction over this matter.

XVIII. NOTICE TO CLASS MEMBERS

The parties agree that notice of this Decree shall be provided to class members, in the form agreed upon and attached hereto as Exhibit D in the following manner. Notice shall consist of mailing the notice appended hereto as Exhibit D and a copy of the Decree to the last known address of class members, where, after reasonable efforts, defendant obtains such data, and of publishing the Notice attached hereto as Exhibit E in the national and New York City editions of The New York Times and in the Daily News on December 22, 1985, December 29, 1985, and January 5, 1986. The notice date of this Decree shall be January 5, 1986 ("notice date"). The cost of all notice to class members shall be an administrative expense of this Decree, as described in Section XX hereof.

XIX. NON-DISCRIMINATION

The Company, its officers, agents, and employees and its successors or assigns, as to jobs covered by this Decree are hereby enjoined from:

A. Engaging in any act, omission, or practice in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), which has the purpose or effect of discriminating against any female employee or class member because of sex with respect to recruiting, hiring, promoting, training, transferring, job assignments, delegation of responsibility or authority, performance evaluations, compensation or other terms or conditions of employment.

B. Limiting, segregating or classifying any female employee of the Company in any way that would deprive her of opportunities available to male employees, or otherwise adversely affect her status as an employee because of her sex, in violation of Title VII.

C. Discriminating in any manner against any female employee or class member because of opposition to any practice pertaining to sex discrimination against women declared unlawful under Title VII, or because he or she has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII, as declared to be unlawful employment practice under Section 704(a) of Title VII.

XX. ADMINISTRATION OF FUNDS, ATTORNEY'S FEES AND COSTS

On or before December 12, 1985, defendant will create an interest-accruing fund of $2.64 million, which will be distributed in the manner described in this Decree. Defendant will make reasonable efforts to maximize the rate of interest on said fund. If the Decree is not effective on or before December 31,

1986, the defendant may, at its discretion, withdraw from the Decree. If it does so, then such fund, together with earned interest, shall revert to the defendant. A trustee shall be appointed by the Court shortly after the effective date of the Decree, and until which time the defendant shall maintain control over the fund. The trustee shall be responsible for withholding of applicable taxes and for distributing the fund as herein set forth. Of the $2.64 million deposited by defendant, $1,925,000 shall be solely for the benefit of the class and shall be used in accordance with Section VIII herein. The remaining $715,000 shall pay all plaintiffs' counsel's attorneys' fees and costs and the EEOC's costs for work performed until November 8, 1985, and constitutes defendant's total obligation for all attorneys' fees and costs of class counsel, predecessor counsel for plaintiffs and the EEOC's costs for work performed until November 8, 1985. Of the $715,000, $100,000 shall be paid to the EEOC for reimbursement of its costs, upon application to the trustee. Subject to court approval, the remaining $615,000 shall be paid to class counsel and all predecessor counsel for reimbursement of plaintiffs' attorneys' fees and costs for work performed until November 8, 1985. Class counsel, predecessor counsel for plaintiffs and the EEOC agree to waive any request for additional fees and costs for work performed as of that date.

Interest earned on the $2.64 million will be applied to pay for work performed and costs incurred from November 8, 1985 through the effective date of the Decree, in the following order of priority: (a) the administrative expenses (including the cost of notice but exclusive of attorney's fees and costs); (b) fees to Special Master Schreiber; and (c) class counsel's attorneys' fees and the costs incurred by class counsel or other attorneys for plaintiffs and the EEOC (and thereafter approved by the Court). In addition, subject to approval of the Court, Sol Schreiber may submit a claim for time expended prior to November 8, 1985 in assisting the parties in settling the case. Such interest shall be the sole source of such costs and fees.

On the effective date of the Decree, the fund shall be transferred to the control of the trustee, who shall oversee all payments as provided under this Decree. The trustee shall maintain the funds in interest bearing accounts until they are distributed. Accrued interest earned prior to the effective date and unexpended for the three purposes described above, shall roll over into interest thereafter earned on the fund until its final distribution as provided in this Decree. All such interest shall be used to pay, in the following order of priority, (a) administrative expenses (including fees to the trustee) incurred after the effective date of the Decree, (b) fees to the Special Master incurred after the effective date of the Decree, and (c) class counsel's attorneys' fees and the costs incurred by class counsel and other attorneys for plaintiffs and the EEOC (and thereafter approved by the court) after the effective date of the Decree.

Reasonable fees and costs incurred by plaintiffs after the effective date of the Decree, which amount is not satisfied by the interest earned as described above, will be further reimbursed by defendant upon approval of the Court pursuant to applicable legal principles.

After the effective date of the Decree and for the duration thereof, and subject to the Court's approval, plaintiffs' counsel shall submit to the Company, on a quarterly basis, a statement for services rendered at plaintiffs' counsel's regular and usual hourly rates, in connection with plaintiffs' counsel's continuing responsibilities under this Decree. Such statements shall be subject to verification by the defendant. When verified, such fees shall be paid in the manner described above.

Consented and agreed to this 12th day of December, 1985.

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.

By: _____
Judith P. Vladeck

Attorneys for Plaintiffs
1501 Broadway
New York, New York 10031

EPSTEIN BECKER BORSODY & GREEN, P.C.

By: _____
Gregory K. Hiestand

Philip M. Berkowitz, Of Counsel
Attorneys for Defendant
250 Park Avenue
New York, New York 10177

_____
Jan F. Constantine

Associate General Counsel
Macmillan, Inc.
866 Third Avenue
New York, New York 10022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20507

Johnny J. Butler
Acting General Counsel

_____
Philip B. Sklover
Associate General Counsel
Trial Services Division

_____
Robert L. Williams
Regional Attorney
New York District Office
90 Church Street, Rm. 1301
New York, New York 10007

_____
Deborah Reik
Senior Trial Attorney

SO ORDERED, this _____ day of _____, 1985.

_____
United States District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

JUNE MEYER, SELMA PUNDYK, AGNES HEALY and DOROTHY DUBOSE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

—and—

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intenvenor,

—and—

MACMILLAN PUBLISHING CO., INC.,

Defendant.

X

78 Civ. 2133 (MEL)

NOTICE OF HEARING FOR THE APPROVAL OF CONSENT DECREE

TO: ALL WOMEN NOW EMPLOYED BY MACMILLAN PUBLISHING COMPANY, INC. AT 866 THIRD AVENUE ("866"), OR IN SALES POSITIONS AT ALL LOCATIONS, OR WHO AT ANY TIME SINCE JULY 1973 WERE SO EMPLOYED, OR APPLIED FOR EMPLOYMENT WITH MACMILLAN PUBLISHING COMPANY, INC. IN SALES POSITIONS AT ALL LOCATIONS.

RE: Settlement of Sex Discrimination and Retaliation Class Action Against Macmillan Publishing Company

You are hereby advised that the United States District Court (Hon. Morris E. Lasker) on December 12, 1985, set a hearing for the approval of a proposed Consent Decree in settlement of the above action. A copy of the Consent Decree is attached.

The Court has scheduled a hearing for March 11, 1986 to consider whether to grant final approval to the Decree, and to consider the objections of any class member to the Decree.

Please read the enclosed Decree carefully. The Decree, if finally approved by the Court, will be binding on all class members as defined therein.

If you do not object to the proposed Decree, you need take no further action at this time. Upon final approval of the Decree, you will receive any payment under the Decree for which you are eligible. If you seek benefits under the provisions set forth in section VIII B of the Decree, you must comply with the procedures set forth therein.

If you do wish to object, you must file your objections in writing (together with copies of any and all other papers you may wish to present in support of your objection) by mailing or delivering such papers to the Clerk, United States District Court, Foley Square, New York, New York 10007 with the following notation on the envelope (Macmillan Publishing Co., Inc—Title VII). A copy of any objection and supporting papers must also be delivered or mailed at the same time to plaintiffs' counsel, Judith T. Vladeck, Esq., Vladeck, Waldman, Elias & Engelhard, P.C., 1501 Broadway, Suite 800, New York, New York 10036, and to defendant's counsel, Gregory K. Hiestand, Esq., Epstein Becker Borsody & Green, P.C., 250 Park Avenue, New York, New York 10177, and to the Equal Employment Opportunity Commission, 90 Church Street, New York, New York 10007, Attention: Deborah Reik, Esq. All such objections must be postmarked or filed in person not later than February 25, 1986. Any class member may also appear either in person or through an attorney of her choice at the settlement hearing to be held at 9:30 a.m. on March 11, 1986, before the Honorable Morris E. Lasker, in the United States District Court, Southern District of New York, Foley Square, New York, New York 10007 in Courtroom 905.

The hearing on March 11, 1986 or any adjournment thereof, may be adjourned without further notice, except as is given by the Court at such hearing or any adjournment thereof.

Any class member who fails to object in the manner specified above shall not be entitled to contest the final approval of the proposed settlement and the judgment entered thereon, and shall be deemed to have waived such objection and shall be foreclosed from raising any objections she might have.

The documents which set forth the agreement of the proposed resolution, disposition and termination of these proceedings, as well as the pleadings and other papers in this action, are on file with the Clerk of the Court. These documents may be inspected during regular business hours at the Office of the Clerk, United States District Court, Southern District of New York, Foley Square, New York, New York 10007.

For further information concerning the settlement, you may write to plaintiffs' counsel, Judith P. Vladeck, Esq. or Joseph J. Garcia, Esq. of the law firm of Vladeck, Waldman, Elias & Engelhard, P.C., 1501 Broadway, Suite 800, New York, New York 10036, or to Deborah Reik, Esq., Equal Employment Opportunity Commission, 90 Church Street, New York, New York 10007. Inquiries should *not* be directed to the Court.

Dated: New York, New York
, 19

RAYMOND F. BURGHART
Clerk, United States District Court for the Southern District of New York

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUNE MEYER, SELMA PUNDYK, AGNES HEALY and DOROTHY DUBOSE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

78 Civ. 2133 (MEL)

—and—

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor,

—against—

MACMILLAN PUBLISHING CO., INC.,

Defendant.

NOTICE OF PENDENCY OF CLASS ACTION AND PROPOSED SETTLEMENT TO MEMBERS OF CLASS

NOTICE IS HEREBY GIVEN that a hearing will be held in Courtroom No. 905 at the United States Courthouse at Foley Square, New York City at 9:30 a.m. on March 11, 1986, for consideration of any showing why a proposed settlement of this litigation, *Meyer, et al. v. Macmillan Publishing Company, Inc.*, Civil Action No. 78 Civ. 2133 (MEL), should not be approved by the Court as fair, just and equitable.

The Court may approve or disapprove the proposed settlement at the hearing, without further notice. The Court may also continue the hearing without further notice. The settlement provides for payment of more than 1.7 million dollars to class members and broad affirmative and injunctive relief.

This action was commenced in 1978, alleging that the defendant[1] discriminated against a nationwide class of all past, present and future female employees and applicants, in violation of Title VII of the Civil

[1] At the time this action was filed, defendant was a separately incorporated, wholly owned subsidiary of Macmillan, Inc. Macmillan Publishing Co., Inc. is presently a division of Macmillan Inc., its parent company, and is now known as the Macmillan Publishing Company, a division of Macmillan, Inc. ("Macmillan Publishing Company" or "defendant"). This lawsuit, the class definition, and the Consent Decree ("Decree") to which this notice pertains relate only to individuals employed by or applying for sales positions with (as defined in the class definition) Macmillan Publishing Company. Neither Macmillan, Inc. nor its subsidiaries, affiliates, or other divisions are parties to this lawsuit or to this Decree. Accordingly, except as specifically provided, non-class members, including the past, present, or future employees of or applicants for employment with any entity other than Macmillan Publishing Company, are not within the ambit of the protections or benefits provided by this Decree.

Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The defendant denied these allegations. On January 31, 1980, the Court granted the Equal Employment Opportunity Commission's ("EEOC") motion for leave to intervene. The litigation was certified as a class action on September 23, 1982.

The class is composed of all of the defendant's past, present and future female employees employed at 866 Third Avenue ("866") and all past, present and future female employees in sales positions at all locations throughout the United States, for the period from July 1973 until the date the action finally terminates. The class also includes unsuccessful female applicants for all sales positions at all locations, from July 1973 until the date that the action finally terminates.

This Notice is published to bring to the attention of class members the maintenance of an action on their behalf and the terms of a proposed settlement. The Court's approval of the settlement is subject to any showing made why the settlement should not be approved.

PLEASE NOTE THE FOLLOWING:

1. You need do nothing in response to this Notice unless you wish to object to the proposed settlement as described below.

2. Any member of the defined class who desires to do so may appear at the March 11, 1986 hearing to provide testimony favoring the settlement agreement or show cause why the settlement should not be approved or why the action should not be disposed of in accordance with the terms of the settlement or present any objections that may be proper and relevant to the issues. However, no objections shall be received and considered, except by special permission of the Court, unless on or before February 25, 1986, the class member files with the Court a written notice of the objection and of all supporting papers she wishes to submit. Any such class member must also serve copies of said papers upon each of the following:

Attorneys for the plaintiffs:

Judith P. Vladeck, Esq.
Vladeck, Waldman, Elias & Engelhard, P.C.
1501 Broadway
New York, New York 10036

Attorneys for the plaintiff-intervenor:

Deborah Reik, Esq.
Equal Employment Opportunity Commission
90 Church Street, Room 1301
New York, New York 10007

Attorneys for the defendant:

Gregory K. Hiestand, Esq.
Epstein Becker Borsody & Green, P.C.
250 Park Avenue
New York, New York 10177

3. The settlement, if approved by the Court, will terminate your individual rights to bring an action against the defendant for the same relief, except: Any member of the class who has filed and is, as of January 5, 1986, pursuing any lawsuit, charge, complaint or claim pertaining to any alleged employment discrimination or retaliation based on sex by Mac/Pub which has been or could have been advanced in this lawsuit, and who elects to continue to do so, shall not share in any monetary or other benefits provided by the Decree. Class members making such election shall, by March 4, 1986, notify the Court that they have made such an election of remedies. Class members so electing may rescind that election within two weeks after final approval of the Decree by the District Court. The defendant shall mail notice to those individuals known to it to whom this section applies, at their last known addresses. Class members unnamed in the caption of the action who preserve their claims by election shall not be represented by class counsel.

A copy of the proposed settlement is available at the following locations:

1. Clerk's Office, United States Courthouse, Foley Square, New York, New York 10007;

2. The offices of Vladeck, Waldman, Elias & Engelhard, P.C., 1501 Broadway, New York, New York 10036; and

3. The offices of the Equal Employment Opportunity Commission, 90 Church Street, Room 1301, New York, New York 10007.

You may also consult your own attorney.

NON-ADMISSION AND NON-DETERMINATION

By entering into the proposed Consent Decree, Mac/Pub does not admit to nor has the Court made a determination that there is or has been a violation of any law, order, rule or regulation. No findings of any kind have been issued by the Court concerning the merits of the plaintiffs' allegations. Mac/Pub has maintained and continues to maintain that it is and has been in full and complete compliance with the provisions of all laws, regulations, rules and orders prohibiting discrimination in employment.

THE PROPOSED SETTLEMENT

I. Monetary Provisions

In their complaint, plaintiffs claimed that certain of Mac/Pub's practices discriminated against women. Mac/Pub, without admitting liability, has agreed to a formula for payments to certain class members.

A. A fund of $1,712,500 shall be distributed to all class members who, as of the date of this Notice, have completed at least two years of employment with the defendant, according to a formula based on salary and years of service.

B. Unsuccessful female applicants for sales positions who applied for such positions between July 1, 1973 and the notice date of this Decree are hereby notified that they may reapply for a sales position. Defendant shall accord no priority or special consideration to those persons but shall evaluate all reapplicants according to the same standards it applies to male sales applicants. A reapplicant who accepts a job offer will be treated the same as all other similarly situated employees.

Plaintiffs' evidence indicates that a maximum of fifteen (15) females were discriminatorily denied opportunities for sales positions between July 1973 and December 1980. Monetary relief from a fund of $37,500 will be distributed on a pro rata basis to a limited number of unsuccessful women applicants for sales positions during that period on the following basis: Individuals who believe that they are one of the fifteen unsuccessful applicants entitled to receive payment under this section may contact class counsel no later than February 28, 1986; class counsel shall provide to such person a form which she must complete promptly, setting forth, in a sworn statement, the bases for her belief that she was denied a sales position because of her sex. Class counsel, in consultation with the EEOC, will review each claim to determine whether the individual appears to be one of the fifteen entitled to relief under this section. Each such unsuccessful female applicant so identified will receive a maximum of $2,500 from the fund, but in no event will such an individual receive less than $1,000. If class counsel is unable to make such determination (e.g., because more than 37 claimants appear to be one of the 15), all claims will be submitted to the Special Master designated by the Decree, who will review the claims and decide the manner and to whom among the claimants the fund shall be distributed. It is contemplated that no adversarial proceedings concerning the distribution of these funds shall occur.

C. As a result of having commenced this litigation in their own names and on behalf of unnamed class members, and of having borne special risks, responsibilities and expenses as class representatives over the length of this litigation, the named plaintiffs have suffered alleged discrimination different from and in

addition to that experienced by other class members. In order to avoid the uncertainty, expense, and further exposure of litigating their individual claims, the parties have agreed to create an additional fund of $175,000 to resolve all of the individual claims of the named plaintiffs. Such monies shall be paid to the named plaintiffs in addition to any monies paid pursuant to section A.

In the event that one of the named plaintiffs elects to continue to pursue her individual claim and chooses not to enter into this Decree, twenty-five percent of $175,000 ($43,750) will be deducted from the fund for the named plaintiffs. No more than one of the named plaintiffs may make such an election. This limitation constitutes a material term of the Decree and upon any breach of this provision, defendant may, at its sole election, void the Decree in its entirety. Should one named plaintiff make an election under this section, class counsel may, in the interest of judicial economy, represent such individual.

D. If the trustee fails to distribute any of the monies provided herein by reason of failure to locate class members after diligent efforts, the remaining monies shall be divided among class members who have been located, using the same formula as the earlier distribution. No monies shall revert to the defendant.

E. *Release of Claims*—In order to receive monetary payments class members must execute a release and waiver of all rights they may have to proceed against defendant for alleged sex discrimination or retaliation which have been or could have been advanced in this lawsuit, based on conduct, acts or events of defendant occurring up to March 11, 1986.

F. *Attorneys' Fees and Costs.* On December 12, 1985, defendant created an interest-accruing fund of $2.64 million, of which $715,000 shall, subject to the approval of the Court, be used to pay all plaintiffs' attorneys' fees and costs and the EEOC's costs for work performed until November 8, 1985. Interest earned on the $2.64 million will be applied to pay for administrative expenses, fees to the Special Master, and fees and costs incurred by plaintiffs' attorneys after November 8, 1985 in a manner fully described in the Decree.

On the effective date of the Decree, the fund shall be transferred to the control of the trustee, who shall maintain the funds in interest bearing accounts until they are distributed. Reasonable fees and costs incurred by plaintiffs after the effective date of the Decree not satisfied by the earned interest will be reimbursed by defendant upon approval of the Court pursuant to applicable legal standards.

II. Goals and Programs

A. *Goals*

The proposed Decree provides goals for placing women in a manner consistent with defendant's Affirmative Action Plan, which has been developed in accordance with government regulations. The EEOC takes no position with regard to, is not a signatory to, and will not participate in the enforcement of this section of the Decree.

B. *Programs*

The proposed Decree contains numerous other provisions as to recruitment, equal employment opportunity training, internal dispute resolution procedure, an expanded tuition refund program, and, at 866, career counselling, expanded job posting, and seminars. A court-appointed Special Master will be available for prompt determination of issues raised by class members which are not resolved by the internal dispute resolution procedure, with final appeal to the Court.

In the Decree, the defendant consents to a broad injunction against sex discrimination or retaliation in connection with employment.

III. Except for those class members who elect to preserve their own claims of sex discrimination and retaliation and forego the benefits of the Decree by filing an election of remedies form with the Court by March 4, 1986, any and all claims of sex discrimination or retaliation against the defendant which have been or could have been advanced in this lawsuit by any class member, for acts occurring on or before March 11, 1986, the date of the fairness hearing concerning the Decree, will be forever barred.

If you have any questions about this Notice, you can contact plaintiffs' attorneys, Vladeck, Waldman, Elias & Engelhard, P.C., Attention: Judith P. Vladeck or Joseph J. Garcia, 1501 Broadway, New York, New York 10036 (212) 354-8330, or the EEOC's counsel, Deborah Reik, Esq., 90 Church Street, New York, New York 10007, (212) 264-7188 or any attorney of your choice. You should *not* contact the Clerk or the Judge with any questions about the Notice or the Proposed Consent Decree.

This notice has been approved by counsel for all parties and by the Court.

Dated:

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United States District Court Judge

APPENDIX J

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

federal register

FRIDAY, AUGUST 25, 1978
PART IV

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CIVIL SERVICE COMMISSION

DEPARTMENT OF LABOR

DEPARTMENT OF JUSTICE

ADOPTION BY FOUR AGENCIES OF UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

58-926 O - 86 - 6

[6570-06]

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Title 5—Administrative Personnel

CHAPTER I—CIVIL SERVICE COMMISSION

PART 300—EMPLOYMENT (GENERAL)

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

PART 50—STATEMENTS OF POLICY

Title 41—Public Contracts and Property Management

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

PART 60-3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Adoption of Employee Selection Procedures

AGENCIES: Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice and Department of Labor.

ACTION: Adoption of uniform guidelines on employee selection procedures as final rules by four agencies.

SUMMARY: This document sets forth the uniform guidelines on employee selection procedures adopted by the Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice, and the Department of Labor. At present two different sets of guidelines exist. The guidelines are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice), 29 CFR Part 1607 (Equal Employment Opportunity Commission), and 41 CFR Part 60-3 (Department of Labor) elsewhere in this issue.

EFFECTIVE DATE: September 25, 1978.

FOR FURTHER INFORMATION CONTACT:

Doris Wooten, Associate Director, Donald J. Schwartz, Staff Psychologist, Office of Federal Contract Compliance Programs, Room C-3324, Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210, 202-523-9426.

Peter C. Robertson, Director, Office of Policy Implementation, Equal Employment Opportunity Commission, 2401 E Street NW., Washington, D.C. 20506, 202-634-7060.

David L. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, 10th Street and Pennsylvania Avenue NW., Washington, D.C. 20530, 202-739-3831.

A. Diane Graham, Director, Federal Equal Employment Opportunity, Civil Service Commission, 1900 E Street NW., Washington, D.C. 20415, 202-632-4420.

H. Patrick Swygert, General Counsel, Civil Service Commission, 1900 E Street NW., Washington, D.C. 20415, 202-632-4632.

SUPPLEMENTARY INFORMATION:

AN OVERVIEW OF THE 1978 UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

I. BACKGROUND

One problem that confronted the Congress which adopted the Civil Rights Act of 1964 involved the effect of written preemployment tests on equal employment opportunity. The use of these test scores frequently denied employment to minorities in many cases without evidence that the tests were related to success on the job. Yet employers wished to continue to use such tests as practical tools to assist in the selection of qualified employees. Congress sought to strike a balance which would proscribe discrimination, but otherwise permit the use of tests in the selection of employees. Thus, in title VII, Congress authorized the use of "any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate * * *".[1]

At first, some employers contended that, under this section, they could use any test which had been developed by a professional so long as they did not intend to exclude minorities, even if such exclusion was the consequence of the use of the test. In 1966, the Equal Employment Opportunity Commission (EEOC) adopted guidelines to advise employers and other users what the law and good industrial psychology practice required.[2] The Department of Labor adopted the same approach in 1968 with respect to tests used by Federal contractors under Executive Order 11246 in a more detailed regulation. The Government's view was that the employer's intent was irrelevant. If tests or other practices had an adverse impact on protected groups, they were unlawful unless they could be justified. To justify a test which screened out a higher proportion of minorities, the employer would have to show that it fairly measured or predicted performance on the job. Otherwise, it would not be considered to be "professionally developed."

In succeeding years, the EEOC and the Department of Labor provided more extensive guidance which elaborated upon these principles and expanded the guidelines to emphasize all selection procedures. In 1971 in *Griggs v. Duke Power Co.*,[3] the Supreme Court announced the principle that employer practices which had an adverse impact on minorities and were not justified by business necessity constituted illegal discrimination under title VII. Congress confirmed this interpretation in the 1972 amendments to title VII. The elaboration of these principles by courts and agencies continued into the mid-1970's,[4] but differences between the EEOC and the other agencies (Justice, Labor, and Civil Service Commission) produced two different sets of guidelines by the end of 1976.

With the advent of the Carter administration in 1977, efforts were intensified to produce a unified government position. The following document represents the result of that effort. This introduction is intended to assist those not familiar with these matters to understand the basic approach of the uniform guidelines. While the guidelines are complex and technical, they are based upon the principles which have been consistently upheld by the courts, the Congress, and the agencies.

The following discussion will cite the sections of the Guidelines which embody these principles.

II. ADVERSE IMPACT

The fundamental principle underlying the guidelines is that employer policies or practices which have an adverse impact on employment opportunities of any race, sex, or ethnic group are illegal under title VII and the Executive order unless justified by business necessity.[5] A selection procedure

[1] Section 703(h), 42 U.S.C. 2000e(2)(h).

[2] See 35 U.S.L.W. 2137 (1966).

[3] 401 U.S. 424 (1971).

[4] See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[5] *Griggs*, note 3, supra; uniform guidelines on employee selection procedures (1978), section 3A, (hereinafter cited by section number only).

which has no adverse impact generally does not violate title VII or the Executive order.[6] This means that an employer may usually avoid the application of the guidelines by use of procedures which have no adverse impact.[7] If adverse impact exists, it must be justified on grounds of business necessity. Normally, this means by validation which demonstrates the relation between the selection procedure and performance on the job.

The guidelines adopt a "rule of thumb" as a practical means of determining adverse impact for use in enforcement proceedings. This rule is known as the "4/5ths" or "80 percent" rule.[8] It is not a legal definition of discrimination, rather it is a practical device to keep the attention of enforcement agencies on serious discrepancies in hire or promotion rates or other employment decisions. To determine whether a selection procedure violates the "4/5ths rule", an employer compares its hiring rates for different groups.[9] But this rule of thumb cannot be applied automatically. An employer who has conducted an extensive recruiting campaign may have a larger than normal pool of applicants, and the "4/5ths rule" might unfairly expose it to enforcement proceedings.[10] On the other hand, an employer's reputation may have discouraged or "chilled" applicants of particular groups from applying because they believed application would be futile. The application of the "4/5ths" rule in that situation would allow an employer to evade scrutiny because of its own discrimination.[11]

III. IS ADVERSE IMPACT TO BE MEASURED BY THE OVERALL PROCESS?

In recent years some employers have eliminated the overall adverse impact of a selection procedure and employed sufficient numbers of minorities or women to meet this "4/5th's rule of thumb". However, they might continue use of a component which does have an adverse impact. For example, an employer might insist on a minimum passing score on a written test which is not job related and which has an adverse impact on minorities.[12] However, the employer might compensate for this adverse impact by hiring a sufficient proportion of minorities who do meet its standards, so that its overall hiring is on a par with or higher than the applicant flow. Employers have argued that as long as their "bottom line" shows no overall adverse impact, there is no violation at all, regardless of the operation of a particular component of the process.

Employee representatives have argued that rights under equal employment opportunity laws are individual, and the fact that an employer has hired some minorities does not justify discrimination against other minorities. Therefore, they argue that adverse impact is to be determined by examination of each component of the selection procedure, regardless of the "bottom line." This question has not been answered definitively by the courts. There are decisions pointing in both directions.

These guidelines do not address the underlying question of law. They discuss only the exercise of prosecutorial discretion by the Government agencies themselves.[13] The agencies have decided that, generally, their resources to combat discrimination should be used against those respondents whose practices have restricted or excluded the opportunities of minorities and women. If an employer is appropriately including all groups in its workforce, it is not sensible to spend Government time and effort on such a case, when there are so many employers whose practices do have adverse effects which should be challenged. For this reason, the guidelines provide that, in considering whether to take enforcement action, the Government will take into account the general posture of the employer concerning equal employment opportunity, including its affirmative action plan and results achieved under the plan.[14] There are some circumstances where the government may intervene even though the "bottom line" has been satisfied. They include the case where a component of a selection procedure restricts promotional opportunities of minorities or women who were discriminatorily assigned to jobs, and where a component, such as a height requirement, has been declared unlawful in other situations.[15]

What of the individual who is denied the job because of a particular component in a procedure which otherwise meets the "bottom line" standard? The individual retains the right to proceed through the appropriate agencies, and into Federal court.[16]

IV. WHERE ADVERSE IMPACT EXISTS: THE BASIC OPTIONS

Once an employer has established that there is adverse impact, what steps are required by the guidelines? As previously noted, the employer can modify or eliminate the procedure which produces the adverse impact, thus taking the selection procedure from the coverage of these guidelines. If the employer does not do that, then it must justify the use of the procedure on grounds of "business necessity."[17] This normally means that it must show a clear relation between performance on the selection procedure and performance on the job. In the language of industrial psychology, the employer must validate the selection procedure. Thus the bulk of the guidelines consist of the Government's interpretation of standards for validation.

V. VALIDATION: CONSIDERATION OF ALTERNATIVES

The concept of validation as used in personnel psychology involves the establishment of the relationship between a test instrument or other selection procedure and performance on the job. Federal equal employment opportunity law has added a requirement to the process of validation. In conducting a validation study, the employer should consider available alternatives which will achieve its legitimate business purpose with lesser adverse impact.[18] The employer cannot concentrate solely on establishing the validity of the instrument or procedure which it has been using in the past.

This same principle of using the alternative with lesser adverse impact is applicable to the manner in which an employer uses a valid selection procedure.[19] The guidelines assume that there are at least three ways in which an employer can use scores on a selection procedure: (1) To screen out of consideration those who are not likely to be able to perform the job successfully; (2) to group applicants in accordance with the likelihood of their successful performance on the job, and (3) to rank applicants, selecting those with the highest scores for employment.[20]

The setting of a "cutoff score" to determine who will be screened out may have an adverse impact. If so, an employer is required to justify the initial cutoff score by reference to its need for a trustworthy and efficient work force.[21] Similarly, use of results for

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[6] *Furnco* v. *Waters*, 98 S.Ct. 2943 (1978).
[7] Section 6.
[8] Section 4D.
[9] Section 16R (definition of selection rate).
[10] Section 4D (special recruiting programs).
[11] *Ibid* (user's actions have discouraged applicants).
[12] See, e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).
[13] Section 4C.
[14] Section 4E.
[15] Section 4C.
[16] The processing of individual cases is excluded from the operation of the bottom line concept by the definition of "enforcement action," section 16L. Under section 4C, where adverse impact has existed, the employer must keep records of the effect of each component for 2 years after the adverse effect has dissipated.
[17] A few practices may be used without validation even if they have adverse impact. See, e.g., *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and section 6B.
[18] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971).
[19] Sections 3B, 5G.
[20] *Ibid.*
[21] See sections 3B, 5H. See also sections 14B(4) (criterion-related validity); 14C(9) (content validity); 14D(1) (construct validity).

groupings or for rank ordering is likely to have a greater adverse effect than use of scores solely to screen out unqualified candidates. If the employer chooses to use a rank order method, the evidence of validity must be sufficient to justify that method of use.[29]

VI. TESTING FOR HIGHER LEVEL JOBS

Normally, employers test for the job for which people are hired. However, there are situations where the first job is temporary or transient, and the workers who remain are promoted to work which involves more complex activities. The guidelines restrict testing for higher level jobs to users who promote a majority of the employees who remain with them to the higher level job within a reasonable period of time.[30]

VII. HOW IS VALIDATION TO BE CONDUCTED

Validation has become highly technical and complex, and yet is constantly changing as a set of concepts in industrial psychology. What follows here is a simple introduction to a highly complex field. There are three concepts which can be used to validate a selection procedure. These concepts reflect different approaches to investigating the job relatedness of selection procedures and may be interrelated in practice. They are (1) criterion-related validity,[31] (2) content validity,[32] and (3) construct validity.[33] In criterion-related validity, a selection procedure is justified by a statistical relationship between scores on the test or other selection procedure and measures of job performance. In content validity, a selection procedure is justified by showing that it representatively samples significant parts of the job, such as a typing test for a typist. Construct validity involves identifying the psychological trait (the construct) which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct. An example would be a test of "leadership ability."

The guidelines contain technical standards and documentation requirements for the application of each of the three approaches.[34] One of the problems which the guidelines attempt to meet is the "borderline" between "content validity" and "construct validity." The extreme cases are easy to understand. A secretary, for example, may have to type. Many jobs require the separation of important matters which must be handled immediately from those which can be handled routinely. For the typing function, a typing test is appropriate. It is justifiable on the basis of content validity because it is a sample of an important or critical part of the job. The second function can be viewed as involving a capability to exercise selective judgment in light of the surrounding circumstances, a mental process which is difficult to sample.

In addressing this situation, the guidelines attempt to make it practical to validate the typing test by a content strategy,[35] but do not allow the validation of a test measuring a construct such as "judgment" by a content validity strategy.

The bulk of the guidelines deals with questions such as those discussed in the above paragraphs. Not all such questions can be answered simply, nor can all problems be addressed in the single document. Once the guidelines are issued, they will have to be interpreted in light of changing factual, legal, and professional circumstances.

VIII. SIMPLIFICATION OF REPORTING AND RECORDKEEPING REQUIREMENTS

The reporting and recordkeeping provisions which appeared in the December 30 draft which was published for comment have been carefully reviewed in light of comments received and President Carter's direction to limit paperwork burdens on those regulated by Government to the minimum necessary for effective regulation. As a result of this review, two major changes have been made in the documentation requirements of the guidelines:

(1) A new section 15A(1) provides a simplified recordkeeping option for employers with fewer than 100 employees;

(2) Determinations of the adverse impact of selection procedures need not be made for groups which constitute less than 2 percent of the relevant labor force.

Also, the draft has been changed to make clear that users can assess adverse impact on an annual basis rather than on a continuing basis.

Analysis of comments. The uniform guidelines published today are based upon the proposition that the Federal Government should speak to the public and to those whom it regulates with one voice on this important subject; and that the Federal Government ought to impose upon itself obligations for equal employment opportunity which are at least as demanding as those it seeks to impose on others. These guidelines state a uniform Federal position on this subject, and are intended to protect the rights created by title VII of the Civil Rights Act of 1964, as amended, Executive Order 11246, as amended, and other provisions of Federal law. The uniform guidelines are also intended to represent "professionally acceptable methods" of the psychological profession for demonstrating whether a selection procedure validly predicts or measures performance for a particular job. *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 425. They are also intended to be consistent with the decisions of the Supreme Court and authoritative decisions of other appellate courts.

Although the development of these guidelines preceded the issuance by President Jimmy Carter of Executive Order 12044 designed to improve the regulatory process, the spirit of his Executive order was followed in their development. Initial agreement among the Federal agencies was reached early in the fall of 1977, and the months from October 1977 until today have been spent in extensive consultation with civil rights groups whose clientele are protected by these guidelines; employers, labor unions, and State and local governments whose employment practices are affected by these guidelines; State and local government antidiscrimination agencies who share with the Federal Government enforcement responsibility for discriminatory practices; and appropriate members of the general public. For example, an earlier draft of these guidelines was circulated informally for comment on October 28, 1977, pursuant to OMB Circular A-85. Many comments were received from representatives of State and local governments, psychologists, private employers, and civil rights groups. Those comments were taken into account in the draft of these guidelines which was published for comment December 30, 1977, 42 FR 66542.

More than 200 organizations and individuals submitted written comments on the December 30, 1977, draft. These comments were from representatives of private industry, public employers, labor organizations, civil rights groups, the American Psychological Association and components thereof, and many individual employers, psychologists, and personnel specialists. On March 2, 1978, notice was given of a public hearing and meeting to be held on April 10, 1978, 43 FR 9131. After preliminary review of the comments, the agencies identified four issues of particular interest, and invited testimony particularly on those issues, 43 FR 11812 (March 21, 1978). In the same notice the agencies published questions and answers on four

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[29] Sections 5G, 14B(6); 14C(9); 14D(1).

[30] Section 5I.

[31] Sections 5B, (General Standards); 14B (Technical Standards); 15B (Documentation); 16F (Definition).

[32] Sections 5B (General Standards); 14C (Technical Standards); 15C (Documentation); 16D (Definition).

[33] Sections 5B (General Standards); 14D (Technical Standards); 15D (Documentation); 16E (Definition).

[34] Technical standards are in section 14; documentation requirements are in section 15.

[35] Section 14C.

issues of concern to the commenters. The questions and answers were designed to clarify the intent of the December 30, 1977, draft, so as to provide a sharper focus for the testimony at the hearing.

At a full day of testimony on April 10, 1978, representatives of private industry, State and local governments, labor organizations, and civil rights groups, as well as psychologists, personnel specialists, and others testified at the public hearing and meeting. The written comments, testimony, and views expressed in subsequent informal consultations have been carefully considered by the four agencies. We set forth below a summary of the comments, and the major issues raised in the comments and testimony, and attempt to explain how we have resolved those issues.

The statement submitted by the American Psychological Association (A.P.A.) stated that "these guidelines represent a major step forward and with careful interpretation can provide a sound basis for concerned professional work." Most of the A.P.A. comments were directed to clarification and interpretation of the present language of the proposal. However, the A.P.A. recommended substantive change in the construct validity section and in the definition of work behavior.

Similarly, the Division of Industrial and Organizational Psychology (division 14) of the A.P.A. described the technical standards of the guidelines as "superior" in terms of congruence with professional standards to "most previous orders and guidelines but numerous troublesome aspects remain." Division 14 had substantial concerns with a number of the provisions of the general principles of the draft.

Civil rights groups generally found the uniform guidelines far superior to the FEA guidelines, and many urged their adoption, with modifications concerning ranking and documentation. Others raised concerns about the "bottom line" concept and other provisions of the guidelines.

The Ad Hoc Group on Employee Selection Procedures representing many employers in private industry supported the concept of uniform guidelines, but had a number of problems with particular provisions, some of which are described below. The American Society for Personnel Administration (ASPA) and the International Personnel Management Association, which represents State and local governments, generally took the same position as the ad hoc group. Major industrial unions found that the draft guidelines were superior to the FEA guidelines, but they perceived them to be inferior to the EEOC guidelines. They challenged particularly the bottom line concept and the construct validity section.

The building trade unions urged an exclusion of apprenticeship programs from coverage of the guidelines. The American Council on Education found them inappropriate for employment decisions concerning faculty at institutions of higher education. Other particular concerns were articulated by organizations representing the handicapped, licensing and certifying agencies, and college placement offices.

General Principles

1. *Relationship between validation and elimination of adverse impact, and affirmative action.* Federal equal employment opportunity law generally does not require evidence of validity for a selection procedure if there is no adverse impact; e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424. Therefore, a user has the choice of complying either by providing evidence of validity (or otherwise justifying use in accord with Federal law), or by eliminating the adverse impact. These options have always been present under Federal law, 29 CFR 1607.3; 41 CFR 60-3.3(a); and the Federal Executive Agency Guidelines, 41 FR 51734 (November 23, 1976). The December 30 draft guidelines, however, clarified the nature of the two options open to users.

Psychologists expressed concern that the December 30 draft of section 6A encouraged the use of invalid procedures as long as there is no adverse impact. Employers added the concern that the section might encourage the use of illegal procedures not having an adverse impact against the groups who have historically suffered discrimination (minorities, women), even if they have an adverse impact on a different group (whites, males).

Section 6A was not so intended, and we have revised it to clarify the fact that illegal acts purporting to be affirmative action are not the goal of the agencies or of the guidelines; and that any employee selection procedure must be lawful and should be as job related as possible. The delineation of examples of alternative procedures was eliminated to avoid the implication that particular procedures are either prescribed or are necessarily appropriate. The basic thrust of section 6A, that elimination of adverse impact is an alternative to validation, is retained.

The inclusion of excerpts from the 1976 Equal Employment Opportunity Coordinating Council Policy Statement on Affirmative Action in section 13B of the December 30 draft was criticized as not belonging in a set of guidelines for the validation of selection procedures. Section 13 has been revised. The general statement of policy in support of voluntary affirmative action, and the reaffirmation of the policy statement have been retained, but this statement itself is now found in the appendix to the guidelines.

2. *The "bottom line" (section 4C).* The guidelines provide that when the overall selection process does not have an adverse impact the Government will usually not examine the individual components of that process for adverse impact or evidence of validity. The concept is based upon the view that the Federal Government should not generally concern itself with individual components of a selection process, if the overall effect of that process is nonexclusionary. Many commenters criticized the ambiguity caused by the word "generally" in the December 30 draft of section 4C which provided, "the Federal enforcement agencies * * * generally will not take enforcement action based upon adverse impact of any component" of a process that does not have an overall adverse impact. Employer groups stated the position that the "bottom line" should be a rule prohibiting enforcement action by Federal agencies with respect to all or any part of a selection process where the bottom line does not show adverse impact. Civil rights and some labor union representatives expressed the opposing concerns that the concept may be too restrictive, that it may be interpreted as a matter of law, and that it might allow certain discriminatory conditions to go unremedied.

The guidelines have been revised to clarify the intent that the bottom line concept is based upon administrative and prosecutorial discretion. The Federal agencies cannot accept the recommendation that they never inquire into or take enforcement action with respect to any component procedure unless the whole process of which it is a part has an adverse impact. The Federal enforcement agencies believe that enforcement action may be warranted in unusual circumstances, such as those involving other discriminatory practices, or particular selection procedures which have no validity and have a clear adverse impact on a national basis. Other unusual circumstances may warrant a high level agency decision to proceed with enforcement actions although the "bottom line" has been satisfied. At the same time the agencies adhere to the bottom line concept of allocating resources primarily to those users whose overall selection processes have an adverse impact. See overview, above, part III.

3. *Investigation of alternative selection procedures and alternative methods of use (section 3B).* The December 30 draft included an obligation on the user, when conducting a validity

study, to investigate alternative procedures and uses, in order to determine whether there are other procedures which are substantially equally valid, but which have less adverse impact. The American Psychological Association stated:

"We would concur with the drafters of the guidelines that it is appropriate in the determination of a selection strategy to consider carefully a variety of possible procedures and to think carefully about the question of adverse impact with respect to each of these procedures. Nevertheless, we feel it appropriate to note that a rigid enforcement of these sections, particularly for smaller employers, would impose a substantial and expensive burden on these employers."

Since a reasonable consideration of alternatives is consistent with the underlying principle of minimizing adverse impact consistent with business needs, the provision is retained.

Private employer representatives challenged earlier drafts of these guidelines as being inconsistent with the decision of the Supreme Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405. No such inconsistency was intended. Accordingly, the first sentence of section 3B was revised to paraphrase the opinion in the *Albemarle* decision, so as to make it clear that section 3B is in accord with the principles of the *Albemarle* decision.

Section 3B was further revised to clarify the intent of the guidelines that the obligation to investigate alternative procedures is a part of conducting a validity study, so that alternative procedures would be evaluated in light of validity studies meeting professional standards, and that section 3B does not impose an obligation to search for alternatives if the user is not required to conduct a validity study.

Just as, under section 3B of the guidelines, a user should investigate alternative selection procedures as a part of choosing and validating a procedure, so should the user investigate alternative uses of the selection device chosen to find the use most appropriate to his needs. The validity study should address the question of what method of use (screening, grouping, or rank ordering) is appropriate for a procedure based on the kind and strength of the validity evidence shown, and the degree of adverse impact of the different uses.

4. *Establishment of cutoff scores and rank ordering.* Some commenters from civil rights groups believed that the December 30 draft guidelines did not provide sufficient guidance as to when it was permissible to use a selection procedure on a ranking basis rather than on a pass-fail basis. They also objected to section 5G in terms of setting cutoff scores. Other comments noted a lack of clarity as to how the determination of a cutoff score or the use of a procedure for ranking candidates relates to adverse impact.

As we have noted, users are not required to validate procedures which do not have an adverse impact. However, if one way of using a procedure (e.g., for ranking) results in greater adverse impact than another way (e.g., pass/fail), the procedure must be validated for that use. Similarly, cutoff scores which result in adverse impact should be justified. If the use of a validated procedure for ranking results in greater adverse impact than its use as a screening device, the evidence of validity and utility must be sufficient to warrant use of the procedures as a ranking device.

A new section 5G has been added to clarify these concepts. Section 5H (formerly section 5G) addresses the choice of a cutoff score when a procedure is to be used for ranking.

5. *Scope: Requests for exemptions for certain classes of users.* Some employer groups and labor organizations (e.g., academic institutions, large public employers, apprenticeship councils) argued that they should be exempted from all or some of the provisions of these guidelines because of their special needs. The intent of Congress as expressed in Federal equal employment opportunity law is to apply the same standards to all users, public and private.

These guidelines apply the same principles and standards to all employers. On the other hand, the nature of the procedures which will actually meet those principles and standards may be different for different employers, and the guidelines recognize that fact. Accordingly, the guidelines are applicable to all employers and other users who are covered by Federal equal employment opportunity law.

Organizations of handicapped persons objected to excluding from the scope of these guidelines the enforcement of laws prohibiting discrimination on the basis of handicap, in particular the Rehabilitation Act of 1973, sections 501, 503, and 504. While this issue has not been addressed in the guidelines, nothing precludes the adoption of the principles set forth in these guidelines for other appropriate situations.

Licensing and certification boards raised the question of the applicability of the guidelines to their licensing and certification functions. The guidelines make it clear that licensing and certification are covered "to the extent" that licensing and certification may be covered by Federal equal employment opportunity law.

Voluntary certification boards, where certification is not required by law, are not users as defined in section 16 with respect to their certifying functions and therefore are not subject to these guidelines. If an employer relies upon such certification in making employment decisions, the employer is the user and must be prepared to justify, under Federal law, that reliance as it would any other selection procedure.

6. *The "Four-Fifths Rule of Thumb" (section 4D).* Some representatives of employers and some professionals suggest that the basic test for adverse impact should be a test of statistical significance, rather than the four-fifths rule. Some civil rights groups, on the other hand, still regard the four-fifths rule as permitting some unlawful discrimination.

The Federal agencies believe that neither of these positions is correct. The great majority of employers do not hire, promote, or assign enough employees for most jobs to warrant primary reliance upon statistical significance. Many decisions in day-to-day life are made on the basis of information which does not have the justification of a test of statistical significance. Courts have found adverse impact without a showing of statistical significance. *Griggs* v. *Duke Power Co.*, supra; *Vulcan Society of New York* v. *CSC of N.Y.*, 490 F. 2d 387, 393 (2d Cir. 1973); *Kirkland* v. *New York St. Dept. of Corr. Serv.*, 520 F. 2d 420, 425 (2d Cir. 1975).

Accordingly, the undersigned believe that while the four-fifths rule does not define discrimination and does not apply in all cases, it is appropriate as a rule of thumb in identifying adverse impact.

Technical Standards

7. *Criterion-related validity (section 14B).* This section of the guidelines found general support among the commenters from the psychological profession and, except for the provisions concerning test fairness (sometimes mistakenly equated with differential prediction or differential validity), generated relatively little comment.

The provisions of the guidelines concerning criterion-related validity studies call for studies of fairness of selection procedures where technically feasible.

Section 14B(8). Some psychologists and employer groups objected that the concept of test fairness or unfairness has been discredited by professionals and pointed out that the term is commonly misused. We recognize that there is serious debate on the question of test fairness; however, it is accepted professionally that fairness should be examined where feasible. The A.P.A. standards for educational and psychological tests, for example, direct users to explore the question of fairness on finding a difference in group performance (section E9, pp. 42–44). Simi-

larly the concept of test fairness is one which is closely related to the basic thrust of Federal equal employment opportunity law; and that concept was endorsed by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405.

Accordingly, we have retained in the guidelines the obligation upon users to investigate test fairness where it is technically feasible to do so.

8. *Content validity.* The Division of Industrial and Organizational Psychology of A.P.A. correctly perceived that the provisions of the draft guidelines concerning content validity, with their emphasis on observable work behaviors or work products, were "greatly concerned with minimizing the inferential leap between test and performance." That division expressed the view that the draft guidelines neglected situations where a knowledge, skill or ability is necessary to an outcome but where the work behavior cannot be replicated in a test. They recommended that the section be revised.

We believe that the emphasis on observable work behaviors or observable work products is appropriate; and that in order to show content validity, the gap between the test and performance on the job should be a small one. We recognize, however, that content validity may be appropriate to support a test which measures a knowledge, skill, or ability which is a necessary prerequisite to the performance of the job, even though the test might not be close enough to the work behavior to be considered a work sample, and the guidelines have been revised appropriately. On the other hand, tests of mental processes which are not directly observable and which may be difficult to determine on the basis of observable work behaviors or work products should not be supported by content validity.

Thus, the Principles for the Validation and Use of Personnel Selection Procedures (Division of Industrial and Organizational Psychology, American Psychological Association, 1975, p. 10), discuss the use of content validity to support tests of "specific items of knowledge, or specific job skills," but call attention to the inappropriateness of attempting to justify tests for traits or constructs on a content validity basis.

9. *Construct validity (section 14D).* Business groups and professionals expressed concern that the construct validity requirements in the December 30 draft were confusing and technically inaccurate. As section 14D indicates, construct validity is a relatively new procedure in the field of personnel selection and there is not yet substantial guidance in the professional literature as to its use in the area of employment practices. The provisions on construct validity have been revised to meet the concerns expressed by the A.P.A. The construct validity section as revised clarifies what is required by the Federal enforcement agencies at this stage in the development of construct validity. The guidelines leave open the possibility that different evidence of construct validity may be accepted in the future, as new methodologies develop and become incorporated in professional standards and other professional literature.

10. *Documentation (section 15).* Commenters stated that the documentation section did not conform to the technical requirements of the guidelines or was otherwise inadequate. Section 15 has been clarified and two significant changes have been made to minimize the recordkeeping burden. (See overview, part VIII.)

11. *Definitions (section 16).* The definition of work behavior in the December 30, 1977 draft was criticized by the A.P.A. and others as being too vague to provide adequate guidance to those using the guidelines who must identify work behavior as a part of any validation technique. Other comments criticized the absence or inadequacies of other definitions, expecially "adverse impact." Substantial revisions of and additions to this section were therefore made.

Uniform Guidelines on Employee Selection Procedures (1978)

Note.—These guidelines are issued jointly by four agencies. Separate official adoptions follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

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General Principles

SECTION 1. *Statement of purpose.*—A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

Sec. 2. *Scope.*—A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective af-

firmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

Sec. 3. *Discrimination defined: Relationship between use of selection procedures and discrimination.*—A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

Sec. 4. *Information on impact.*—A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause

the pool of minority or female candidates to the atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon applicant pools which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable promotional pool.

E. Consideration of user's equal employment opportunity posture. In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

Sec. 5. General standards for validity studies. A description of the kinds of validity studies that will be considered satisfactory by the Federal enforcement agencies is set forth below. Generally, it is the responsibility of the user or other person initiating or relying on these studies to investigate the technical feasibility of carrying out these studies before they are undertaken. Where the user cannot take or rely upon studies of the type described as being preferred in these guidelines, the user will be expected to take or rely upon studies of the next preferred type, unless the user can show that studies of the preferred type are not feasible. A user may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. Any strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. Criterion-related, content, and construct validity. Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. Guidelines are consistent with professional standards. The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. Need for documentation of validity. For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. Accuracy and standardization. Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. Caution against selection on basis of knowledges, skills, or abilities learned in brief orientation period. In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. Method of use of selection procedures. The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. Cutoff scores. Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. Use of selection procedures for higher level jobs. If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. Interim use of selection procedures. Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to pro-

duce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

SEC. 6. *Use of selection procedures which have not been validated.*—A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

SEC. 7. *Use of other validity studies.*—A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study.* If validity evidence from a study covering more than one unit within an organization satisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables.* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

SEC. 8. *Cooperative studies.*—A. *Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

SEC. 9. *No assumption of validity.*—A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

SEC. 10. *Employment agencies and employment services.*—A. *Where selection procedures are devised by agency.* An employment agency, including pri-

vate employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

Sec. 11. *Disparate treatment.* The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

Sec. 12. *Retesting of applicants.* Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

Sec. 13. *Affirmative action.*—A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

Technical Standards

Sec. 14. *Technical standards for validity studies.* The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies.*—(1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment con-

text. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., coorelation coefficent) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally

with appropriate revisions in its use to assure comparability between the probability of successful job performance and the probability of being selected.

(c) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 14B, below) an investigation of fairness requires the following:

(1) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(2) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(d) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies.*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or

work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies.*— (1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence.*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3), above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

Documentation of Impact and Validity Evidence

Sec. 15. *Documentation of impact and validity evidence.*—A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO-2, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 5).

(2) *Information on impact.*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 5D above, for

the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence.*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercial-

ly available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less than perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (*e.g.*, as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (*e.g.*, hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of

the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent

information relating to the study of construct validity.

(15) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. Evidence of validity from other studies. When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies.*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

F. Evidence of validity from cooperative studies. Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. Selection for higher level job. If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. Interim use of selection procedures. If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

Definitions

Sec. 16. *Definitions.* The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer.* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontactor covered by Executive Order 11246, as amended.

H. *Employment agency.* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action.* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency.* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis.* A detailed statement of work behaviors and other information relevant to the job.

L. *Job description.* A general statement of job duties and responsibilities.

M. *Knowledge.* A body of information applied directly to the performance of a function.

N. Labor organization. Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. Observable. Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. Race, sex, or ethnic group. Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. Selection procedure. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. Selection rate. The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. Should. The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. Skill. A present, observable competence to perform a learned psychomoter act.

U. Technical feasibility. The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. Unfairness of selection procedure. A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. User. Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. Validated in accord with these guidelines or properly validated. A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. Work behavior. An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

APPENDIX

17. *Policy statement on affirmative action* (see section 13B). The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether precentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the precentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine

which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

RICHARD ALBRECHT,
General Counsel,
Department of the Treasury.

Section 18. *Citations.* The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The *official citation* is:

"Section ——, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR —— (August 25, 1978)."

The *short form citation* is:

"Section ——, U.G.E.S.P. (1978); 43 FR —— (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ——, (August 25, 1978); 29 CFR Part 1607, section 6A."

ELEANOR HOLMES NORTON,
Chair, Equal Employment Opportunity Commission.

ALAN K. CAMPBELL,
Chairman,
Civil Service Commission.

RAY MARSHALL,
Secretary of Labor.

GRIFFIN B. BELL,
Attorney General.

[6570-06]

CIVIL SERVICE COMMISSION

Title 5—Administrative Personnel

CHAPTER I—CIVIL SERVICE COMMISSION

PART 300—EMPLOYMENT (GENERAL)

Uniform Guidelines on Employee Selection Procedures (1978)

The Uniform Guidelines on Employee Selection Procedures (1978) which are printed at the beginning of this part IV in today's FEDERAL REGISTER are adopted by the Civil Service Commission, in conjunction with the Equal Employment Opportunity Commission, Department of Justice, and the Department of Labor to establish uniformity in prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 29 CFR parts 1607 (Equal Employment Opportunity Commission), 28 CFR 50.14 (Department of Justice); and 41 CFR 60-3 (Department of Labor) elsewhere in this issue of the FEDERAL REGISTER.

By virtue of the authority vested in it by sections 3301, 3302, 7151, 7154, and 7301 of title 5 and section 4763(b) of title 42, United States Code, and Executive Order 10577, 3 CFR 1954-58 comp. page 218 and Executive Order 11478, 3 CFR 1959 comp. 133, and section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16), the Civil Service Commission amends title 5, part 300, subpart A, § 300.103(c) of the Code of Federal Regulations to read as follows:

§ 300.103 Basic requirements.

"(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor. Employee selection procedures shall meet the standards established by the "Uniform Guidelines on Employee Selection Procedures (1978), 43 FR—— (August 25, 1978)."

The Civil Service Commission rescinds the Guidelines on Employee Selection Procedures, 41 FR 51732, Federal Personnel Manual part 900, subpart F and adopts the Uniform Guidelines on Employee Selection Procedures (1978), to be issued as identical supplement appendices to subchapters 271-1, Development of Classification Standards; 271-2, Tests and Other Applicant Appraisal Procedures; 335-1, Evaluation of Employees for Promotion and Internal Placement; and 990-1 (Book III), part 900, subpart F, Administration of Standards for a Merit System of Personnel Administration of the Federal Personnel Manual in order to insure that examining, testing standards, and employment practices are not affected by discrimination on the basis of race, color, religion, sex or national origin.

Effective date: September 25, 1978.

ALAN K. CAMPBELL,
Chairman,
Civil Service Commission.

[6570-06]

DEPARTMENT OF JUSTICE

Title 28—Judicial Administration

CHAPTER 1—DEPARTMENT OF JUSTICE

PART 50—STATEMENTS OF POLICY

Uniform Guidelines on Employee Selection Procedures (1978)

The Uniform Guidelines on Employee Selection Procedures which are provided at the beginning of this part IV in today's FEDERAL REGISTER are adopted by the Department of Justice, in conjunction with the Civil Service Commission, Equal Employment Opportunity Commission, and the Department of Labor to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c), (Civil Service Commission) 29 CFR 1607 (Equal Employment Opportunity Commission), and 41 CFR 60-3 (Department of Labor), elsewhere in this issue of the FEDERAL REGISTER.

By virtue of the authority vested in me by 28 U.S.C. 509 and 5 U.S.C. 301, Sec. 50.14 of part 50 of chapter 1 of title 28 of the Code of Federal Regulations is amended by substituting the Uniform Guidelines on Employee Selection Procedures (1978) for part I through part IV.

Effective date: September 25, 1978.

GRIFFIN B. BELL,
Attorney General.

[6570-06]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

The Uniform Guidelines on Employee Selection Procedures which are printed at the beginning of this part IV in today's FEDERAL REGISTER are adopted by the Equal Employment Opportunity Commission, in conjunction with the Civil Service Commission, Department of Justice, and the Department of Labor to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice) and 41 CFR 60-3 Department of Labor), elsewhere in this issue.

By virtue of the authority vested in it by sections 713 and 709 of title VII of the Civil Rights Act of 1964 (78 Stat. 265), as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261), (42 U.S.C. 2000e-12 and 2000e-8), the Equal Employment Opportunity Commission hereby revises part 1607 of chapter XIV of title 29 of the Code of Federal Regulations by rescinding the Guidelines on Employee Selection Procedures (see 35 FR 12333, August 1, 1970; and 41 FR 51984, November 24, 1976) and adopting the Uniform Guidelines on Employee Selection Procedures (1978) as a new part 1607.

Effective date: September 25, 1978.

ELEANOR HOLMES NORTON,
Chair.

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(5) Criterion Measures
(6) Sample Description
(7) Description of Selection Procedure
(8) Techniques and Results
(9) Alternative Procedures Investigated
(10) Uses and Applications
(11) Source Data
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(13) Accuracy and Completeness
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[4510-06]

DEPARTMENT OF LABOR

Title 41—Public Contracts and Property Management

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

PART 60-3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

The Uniform Guidelines on Employee Selection Procedures which are printed at the beginning of this part IV of today's FEDERAL REGISTER are adopted by the Department of Labor, in conjunction with the Civil Service Commission, Department of Justice, and the Equal Employment Opportunity Commission to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice) and 29 CFR 1607 (Equal Employment Opportunity Commission), elsewhere in this issue of the FEDERAL REGISTER.

By virtue of the authority of sections 201, 202, 203, 203(a), 205, 206(a), 301, 303(b), and 403(b) of Executive Order 11246, as amended, 30 FR 12319; 32 FR 14303; section 60-1.2 of part 60-1 of 41 CFR chapter 60, and section 715 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), part 60-3 of chapter 60 of title 41 of the Code of Federal Regulations is revised by rescinding the Guidelines on Employee Selection Procedures (see 41 FR 51744, November 23, 1976) and adopting the Uniform Guidelines on Employee Selection Procedures (1978) as a new part 60-3.

Effective date: September 25, 1978.

RAY MARSHALL,
Secretary of Labor.

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- A. Procedure Having Adverse Impact Constitutes Discrimination Unless Justified
- B. Consideration of Suitable Alternative Selection Procedures

60-3.4 Information on Impact
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- B. Applicable Race, Sex, and Ethnic Groups for Recordkeeping
- C. Evaluation of Selection Rates. The "Bottom Line"
- D. Adverse Impact and the "Four-Fifths Rule"
- E. Consideration of User's Equal Employment Opportunity Posture

60-3.5 General Standards for Validity Studies
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  - (6) Prior Training or Experience
  - (7) Training Success
  - (8) Operational Use
  - (9) Ranking Based on Content Validity Studies
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  - (1) Appropriateness of Construct Validity Studies
  - (2) Job Analysis for Construct Validity Studies
  - (3) Relationship to the Job
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    - (a) Collection of Information on Impact
    - (b) When Adverse Impact Has Been Eliminated in the Total Selection Process
    - (c) When Data Insufficient to Determine Impact
  - (3) Documentation of Validity Evidence
    - (a) Type of Evidence
    - (b) Form of Report
    - (c) Completeness
- B. Criterion-Related Validity Studies
  - (1) User(s), Location(s), and Date(s) of Study
  - (2) Problem and Setting
  - (3) Job analysis or Review of Job Information
  - (4) Job Titles and Codes
  - (5) Criterion Measures
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  - (9) Alternative Procedures Investigated
  - (10) Uses and Applications
  - (11) Source Data
  - (12) Contact Person

(13) Accuracy and Completeness
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§0-3.16 Definitions

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§0-3.17 Policy Statement on Affirmative Action (see section 1H)
§0-3.18 Citations

[FR Doc. 78-23997 Filed 8-22-78; 4:48 pm]

APPENDIX K

Case Processing and Litigation Statistics

TABLE 1A

EEOC Charge Inventory,
National Totals, FY1982-FY1985

	FY1982	FY1983	FY1984	FY1985
Pending Inventory 1/	48,300	33,417	31,538	39,893
Receipts 2/	50,935	66,461	66,251	67,119
Caseload 3/	99,235	99,878	97,789	107,012
Closures 4/	67,052	74,441	55,034	62,494
Carryover 5/	33,417	31,538	39,893	44,918
Caseload less Closures 6/	32,183	25,437	42,755	44,518
Carryover Rate	33.7%	31.6%	40.8%	42.0%
Caseload less Closures Rate	32.4%	25.5%	43.7%	41.6%
FEPA Receipts 7/	41,465	46,306	49,418	52,576

NOTES: 1/ All charges remaining open in the administrative workload which were forwarded from the previous fiscal year.

2/ Charges initially received by the EEOC to be processed, exclusive of charges received by EEOC and deferred to and processed by State and local agencies under EEOC/FEPA (Local Fair Employment Practices Agencies) work-sharing agreements, and charges received by FEPAs and subsequently transferred back into EEOC's processing workload for final resolution.

3/ EEOC Pending Inventory plus EEOC Receipts.

4/ Total charges closed by the EEOC, including some charges received by FEPAs and subsequently transferred to EEOC for final processing and resolution.

5/ EEOC Pending Inventory of charges unresolved at the end of the fiscal year. May not match Caseload-less-Closures figure; see "Source".

6/ Caseload minus EEOC Closures.

7/ Total charges in the processing workload of the State and Local Fair Employment Practices Agencies (FEPAs), including charges received by the FEPAs as well as charges received by EEOC and deferred to the FEPAs.

SOURCE: Equal Employment Opportunity Commission. Because of EEOC data collection procedures, some Closed cases are not included in the Caseload. However, the figures in this table are EEOC's best available estimates.

TABLE 1B

EEOC Charge Inventory,
For Selected District Offices,
By Type of Charge Processing Unit, FY1985

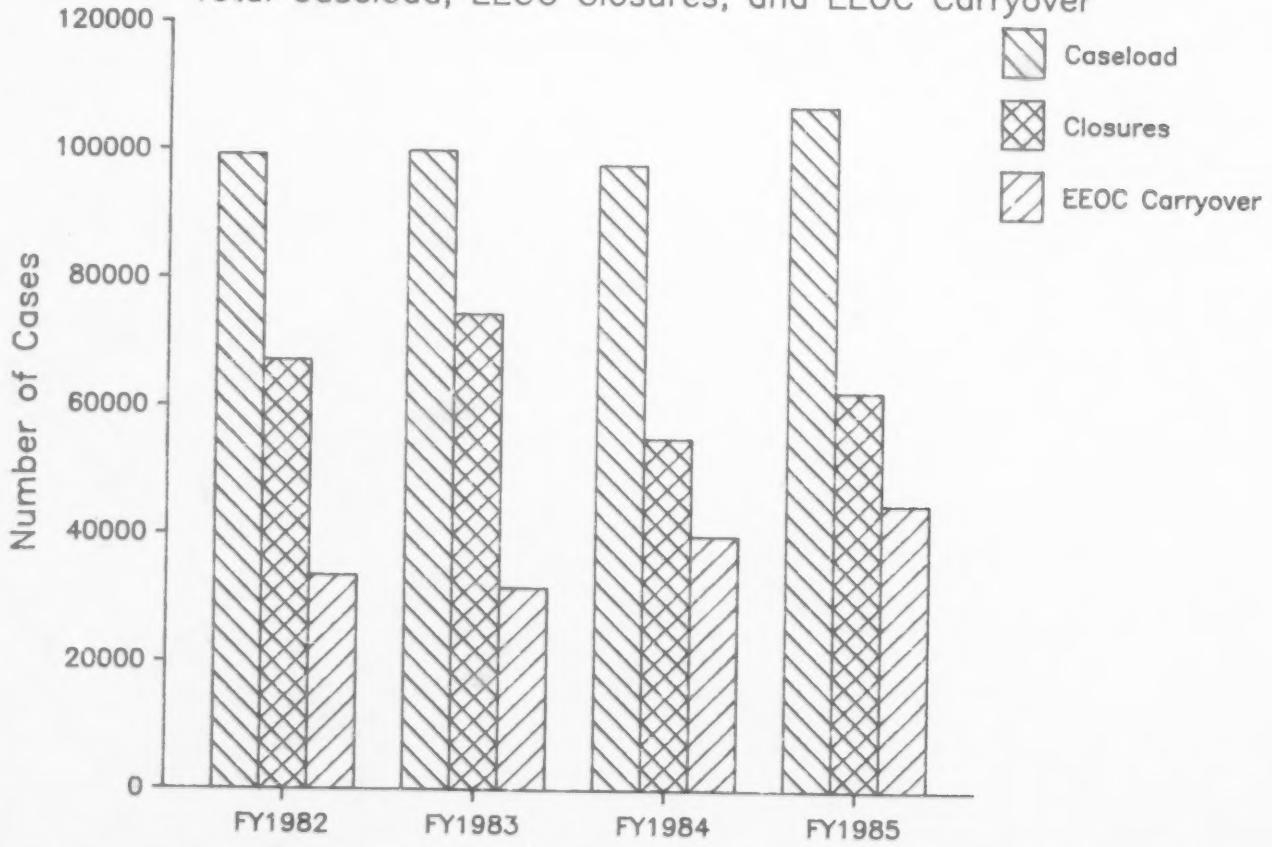
District Office	Pending Inventory 1/	Receipts 2/	Caseload 3/	Closures 4/	Carry-over 5/
Rapid Processing Unit					
Birmingham (AL)	1,105	1,694	2,799	2,322	326
Chicago (IL)	1,724	2,768	4,492	2,378	1,613
Houston (TX)	1,377	2,919	4,296	2,412	1,744
Los Angeles (CA)	2,126	2,897	5,023	2,021	2,083
New York (NY)	675	907	1,582	854	713
St. Louis (MO)	699	1,340	2,039	1,017	881
Extended Processing Unit					
Birmingham (AL)	139	478	617	442	164
Chicago (IL)	423	765	1,188	475	482
Houston (TX)	262	1,019	1,281	735	584
Los Angeles (CA)	552	762	1,314	599	678
New York (NY)	420	925	1,345	297	1,001
St. Louis (MO)	155	386	541	517	169
TOTAL - All Charge Processing Units					
Birmingham (AL)	1,244	2,172	3,416	2,764	490
Chicago (IL)	2,147	3,533	5,680	2,853	2,095
Houston (TX)	1,639	3,938	5,577	3,147	2,328
Los Angeles (CA)	2,678	3,659	6,337	2,620	2,761
New York (NY)	1,095	1,832	2,927	1,151	1,714
St. Louis (MO)	854	1,726	2,580	1,534	1,050

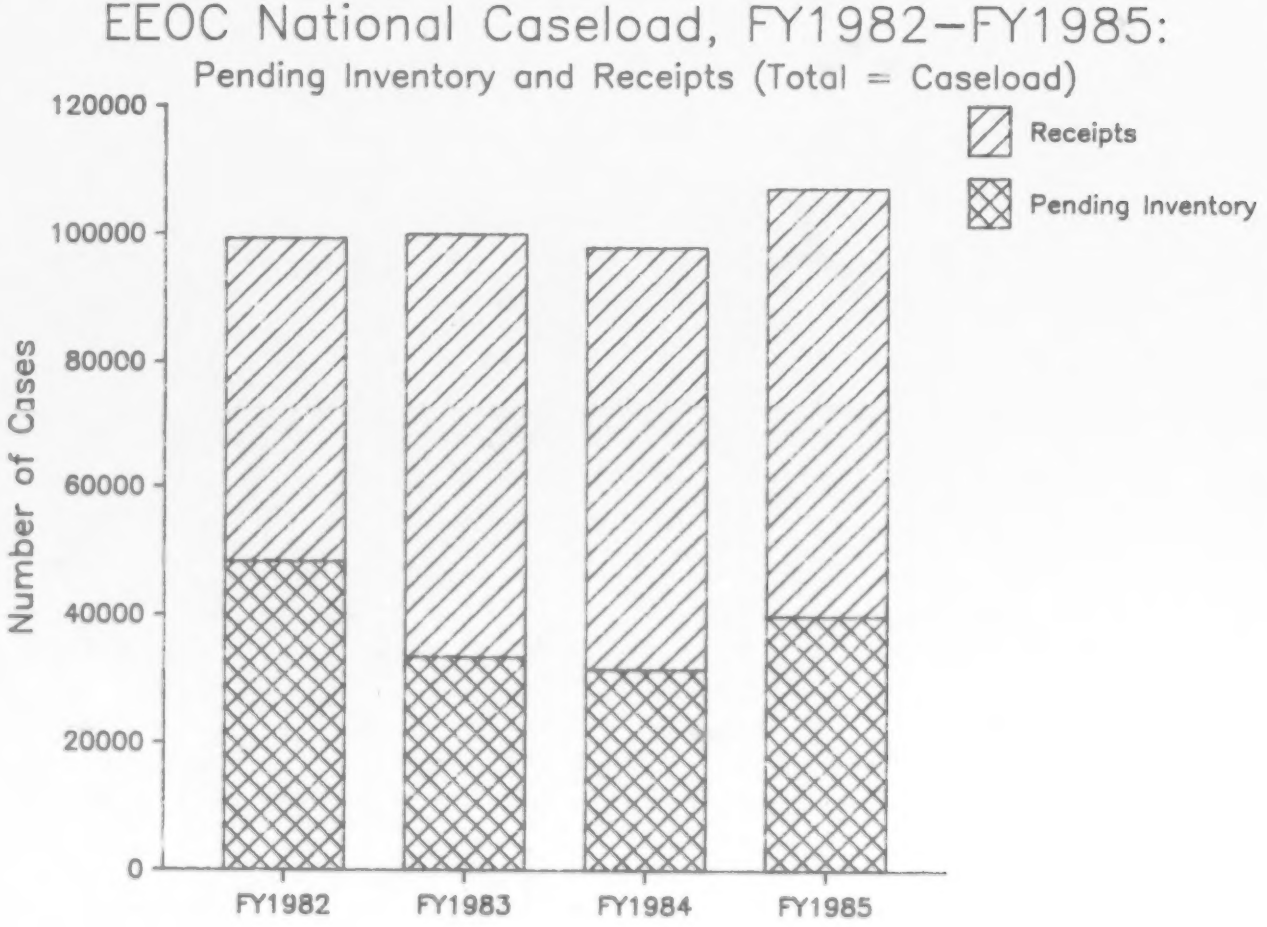
NOTES: 1/ All charges remaining open in the administrative workload which were forwarded from the previous fiscal year.
2/ Charges initially received by the EEOC to be processed, exclusive of charges received by EEOC and deferred to and processed by State and local agencies (under EEOC/FEPA work-sharing agreements), and charges received by FEPAs and subsequently transferred back into EEOC's processing workload for final resolution.
3/ EEOC Pending Inventory plus EEOC Receipts.
4/ Total charges closed by the EEOC, including some charges received by FEPAs and subsequently transferred to EEOC for final processing and resolution.
5/ EEOC Pending Inventory of charges unresolved at the end of the fiscal year.

SOURCE: EEOC District Office Performance Indicator Quarterly Reports, Fourth Quarter FY1985.

EEOC National Carryover, FY1982–FY1985:

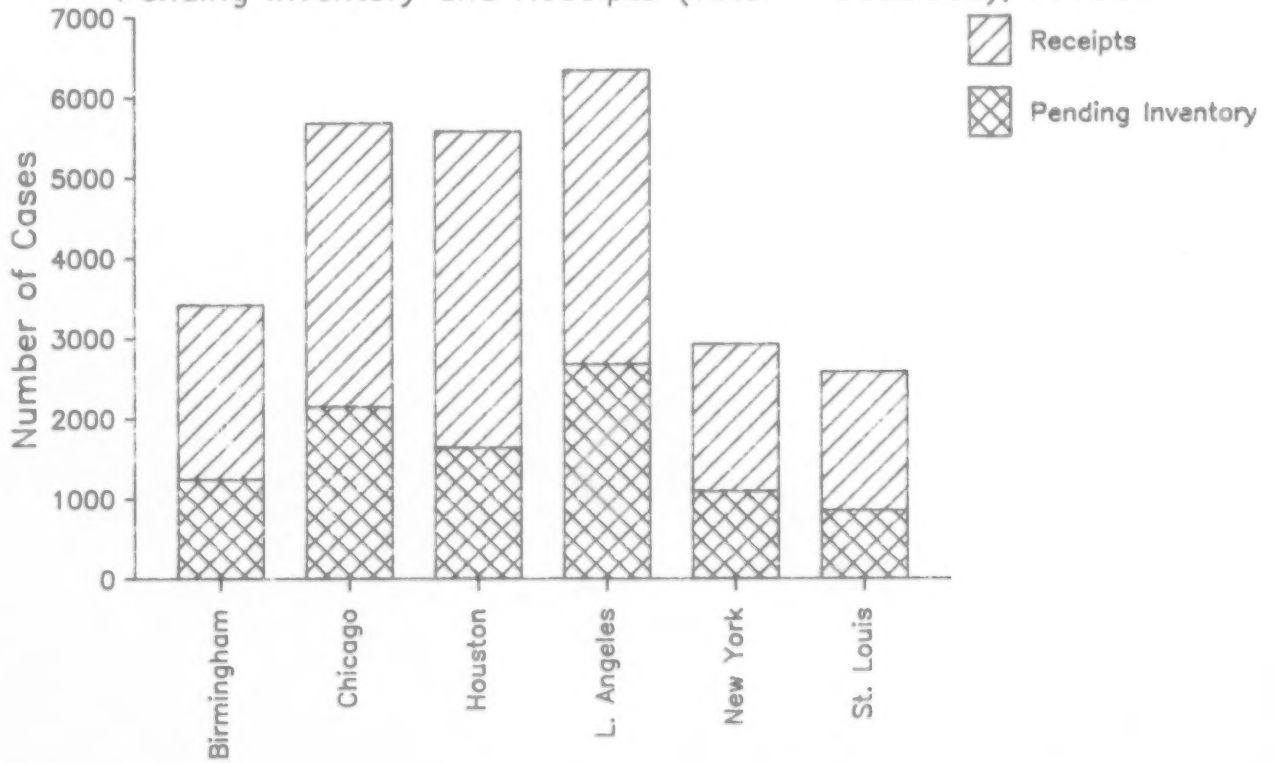
Total Caseload, EEOC Closures, and EEOC Carryover




EEOC National Caseload, FY1982–FY1985:
Pending Inventory and Receipts (Total = Caseload)
Number of Cases
120000
100000
80000
60000
40000
20000
0
FY1982
FY1983
FY1984
FY1985
Receipts
Pending Inventory

EEOC Caseload, for Selected District Offices:

Pending Inventory and Receipts (Total = Caseload), FY1985



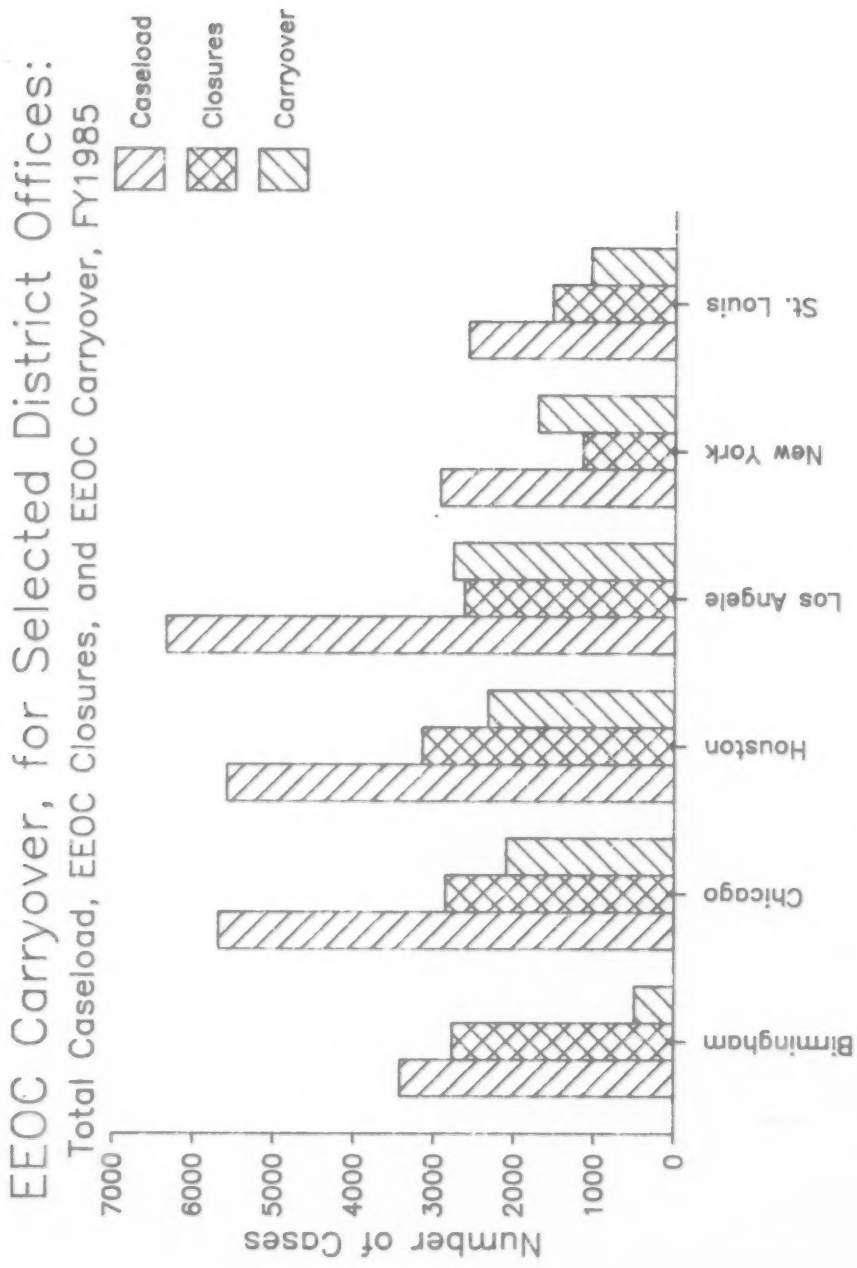

EEOC Carryover, for Selected District Offices:
Total Caseload, EEOC Closures, and EEOC Carryover, FY1985
Caseload
Closures
Carryover
Number of Cases
0
1000
2000
3000
4000
5000
6000
7000
Birmingham
Chicago
Houston
Los Angele
New York
St. Louis

TABLE 2A

EEOC Cases in Litigation (Recommended & Filed), Including Subpoena Enforcement Actions, National Totals, FY1981-FY1985

	FY1981	FY1982	FY1983	FY1984	FY1985
Caseload	N/A	99,235	99,878	97,789	107,012
Suits Recommended	469	401	338	276	708
Suits Filed	368	164	136	222	286
Recommendation rate 1/	N/A	.4%	.3%	.3%	.7%
Filing rate 1/	N/A	.2%	.1%	.2%	.3%
Subpoena Enforcement	76	77	59	88	125

NOTES: 1/ Percentage of Caseload.
N/A Not Available

SOURCE: Equal Employment Opportunity Commission Annual Reports, FY1981-FY1983; and EEOC Office of Program Operations Annual Report, FY1985.

National EEOC: Litigation Cases, FY1981–85:

Suits Recommended, Suits Filed, and Subpoena Enforcement Actions

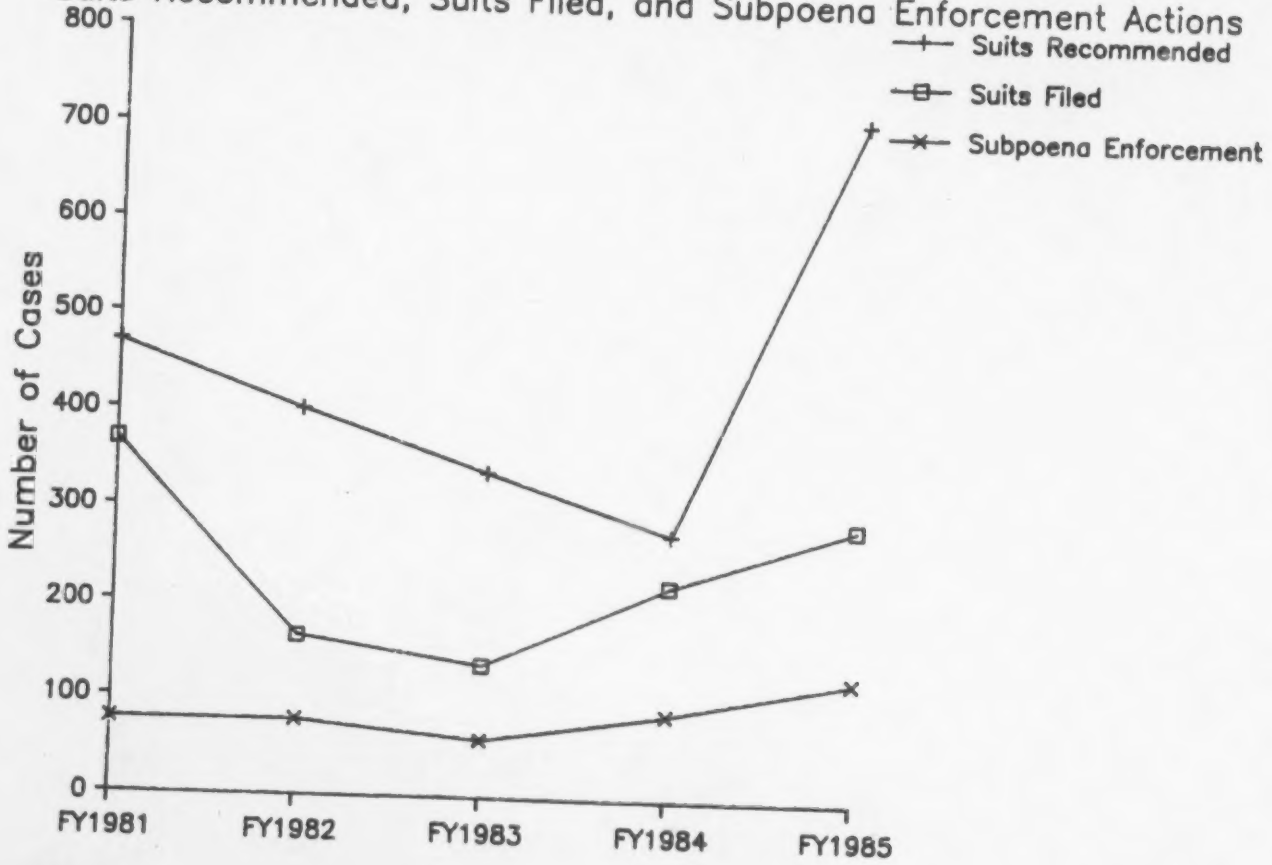


TABLE 2B

EEOC Cases in Litigation (Recommended & Filed), Including Subpoena Enforcement Actions, By District Office, FY1981-1983

District Office	FY1981			FY1982			FY1983		
	Suits Recomm'd	Suits Filed	Sub-poena Enfcmt.	Suits Recomm'd	Suits Filed	Sub-poena Enfcmt.	Suits Recomm'd	Suits Filed	Sub-poena Enfcmt.
Atlanta	14	10	3	23	5	8	14	2	5
Baltimore	9	13	2	16	3	2	17	7	1
Birmingham *	22	12	1	28	7	1	26	7	3
Charlotte	16	13	11	18	14	6	17	8	5
Chicago *	14	21	10	23	9	5	19	4	4
Cleveland	24	17	1	17	10	3	14	7	1
Dallas	37	21	4	27	6	2	15	3	7
Denver	17	18	1	11	3	1	10	4	1
Detroit	30	26	3	45	9	3	11	3	0
Houston *	26	19	4	28	14	2	20	6	8
Indianapolis	17	17	0	12	6	0	11	9	1
Los Angeles *	36	24	1	33	10	0	15	6	0
Memphis	17	12	3	23	8	4	6	8	2
Miami	11	9	1	19	10	4	8	1	3
Milwaukee	15	13	3	12	5	0	2	4	4
New Orleans	17	11	6	22	7	13	12	4	0
New York *	14	12	0	13	4	0	12	6	2
Philadelphia	35	24	10	41	11	6	45	19	3
Phoenix	21	20	3	22	1	5	9	8	4
San Francisco	27	22	4	15	4	2	21	9	2
Seattle	18	9	0	17	8	1	11	5	1
St. Louis *	29	25	5	25	10	9	23	6	2
HQ.	3	0	0	0	0	0	0	0	0
TOTALS	469	368	76	490	164	77	338	136	59

NOTES: * District Office visited.

SOURCES: Equal Employment Opportunity Commission Annual Reports, FY1981-FY1983.

EEOC Cases in Litigation, FY1981–FY1983:

Suits Recommended, for Selected District Offices

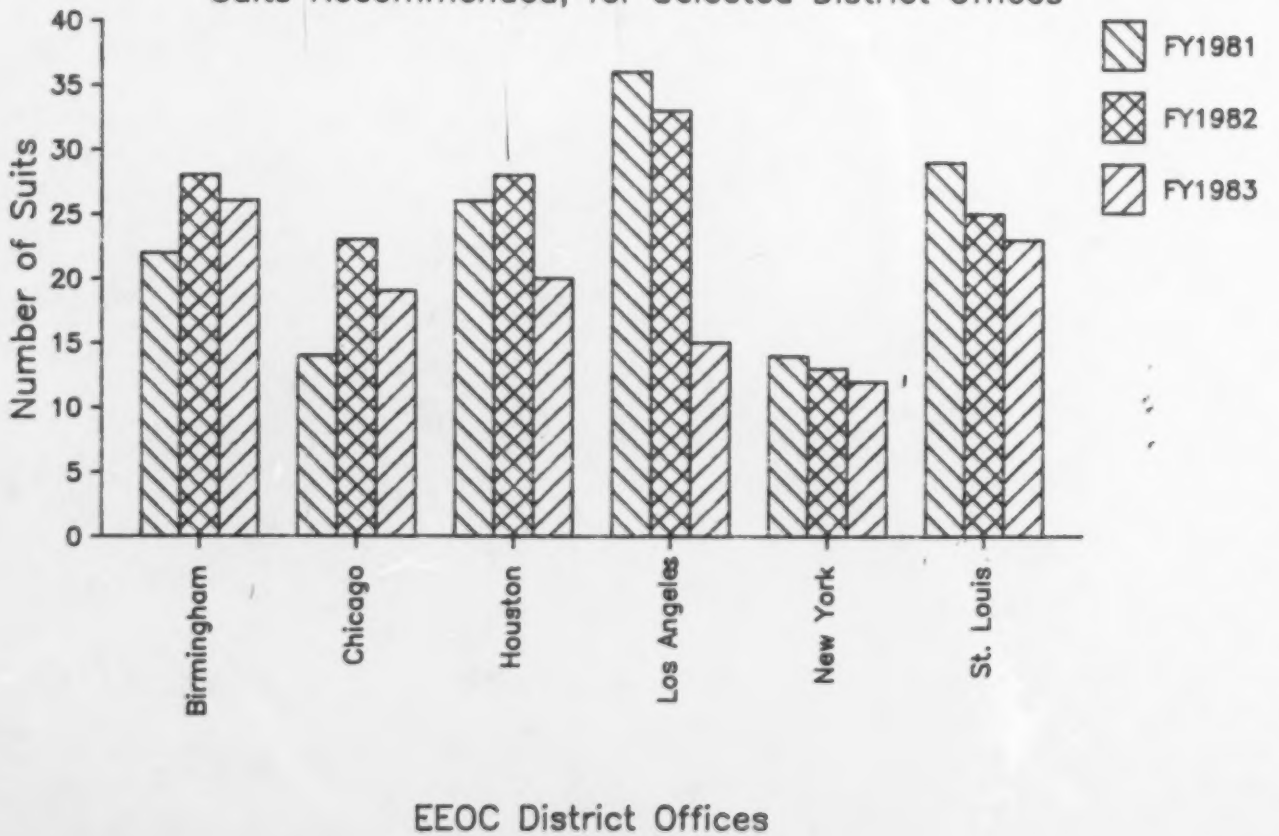


TABLE 3A

Number and Percent of EEOC Case Closures,
by Type of Closure, National Totals, FY1981-FY1985

	FY1981	FY1982	FY1983	FY1984	FY1985
Caseload	N/A	99,235	99,878	97,789	107,012
Number of Closures					
Cause	N/A	1,970	2,565	2,128	1,953
No Cause	21,097	23,462	30,570	25,675	35,139
Administrative	27,375	21,915	21,832	15,771	16,421
Settlements	21,219	19,705	19,474	11,460	8,981
TOTAL	N/A	67,052	74,441	55,034	62,494
Percent of Total Closures					
Cause	N/A	2.9%	3.4%	3.9%	3.1%
No Cause	N/A	35.0%	41.1%	46.7%	56.2%
Administrative	N/A	32.7%	29.3%	28.7%	26.3%
Settlements	N/A	29.4%	26.2%	20.8%	14.4%
TOTAL		100.0%	100.0%	100.0%	100.0%

NOTE: N/A Not Available

SOURCE: Equal Employment Opportunity Commission Annual Report, FY1981; and EEOC Office of Program Operations Annual Report, FY1985.

TABLE 38

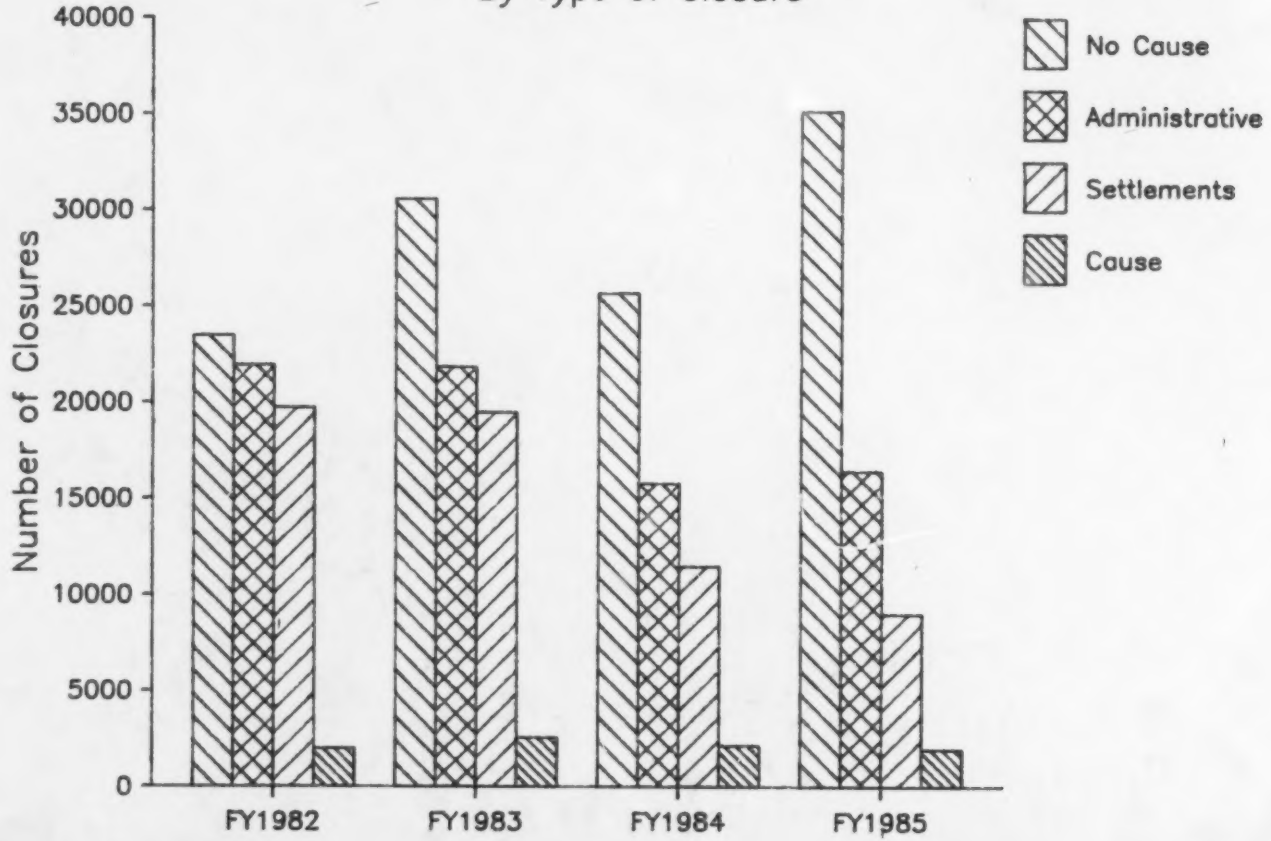
EEOC Case Closures, by Type:
for Selected District Offices, FY1985

District Office	Type of Case Closure: Cause	No Cause	Withdrawal with Benefits	Success. Conciliations	Unsuccess. Conciliations	Administrative	Settlements	TOTAL CASE CLOSURES
NUMBER of Case Closures								
Birmingham (AL)	41	1,656	126	2	27	686	226	2,764
Chicago (IL)	51	1,532	131	8	56	892	183	2,853
Houston (TX)	83	1,870	170	9	57	588	368	3,145
Los Angeles (CA)	73	1,047	208	12	70	996	215	2,621
New York (NY)	51	551	64	20	53	373	39	1,151
St. Louis (MO)	170	854	75	26	152	175	80	1,532
PERCENT of Case Closures								
Birmingham (AL)	1.5%	59.9%	4.6%	.0%	1.0%	24.8%	8.2%	100.0%
Chicago (IL)	1.8%	53.7%	4.6%	.3%	2.0%	31.3%	6.4%	100.0%
Houston (TX)	2.6%	59.5%	5.4%	.3%	1.8%	18.7%	11.7%	100.0%
Los Angeles (CA)	2.8%	39.9%	7.9%	.5%	2.7%	38.0%	8.2%	100.0%
New York (NY)	4.4%	47.9%	5.6%	1.7%	4.6%	32.4%	3.4%	100.0%
St. Louis (MO)	11.1%	55.7%	4.9%	1.7%	9.9%	11.4%	5.2%	100.0%

SOURCE: EEOC District Office Performance Indicator Quarterly Reports, Fourth Quarter FY1985.

EEOC National Case Closures, FY1982–FY1985:

By Type of Closure



EEOC National Case Closures, FY1982–FY1985:

By Type of Closure, As Percentage of Total Closures

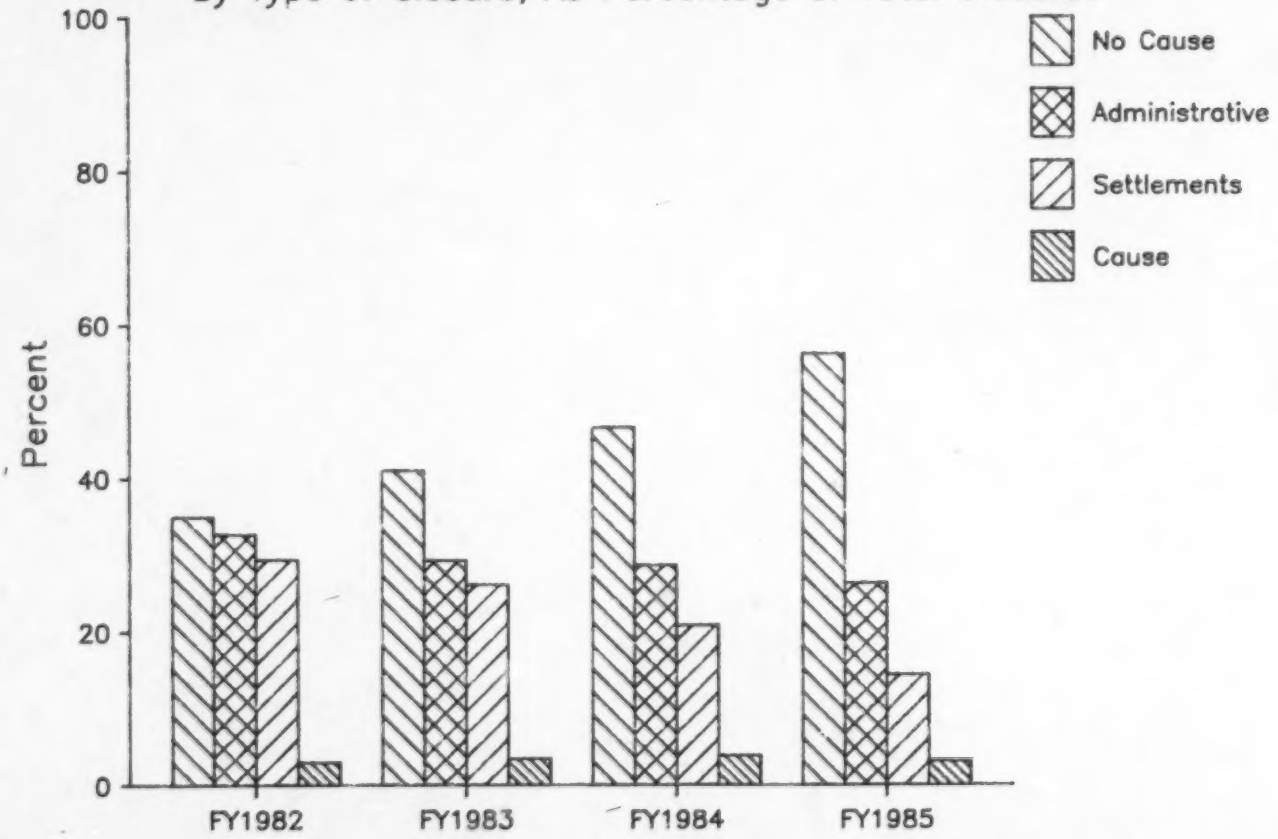


TABLE 4A

EEOC Charges 300 Days Old, as Percent of Pending Inventory, National Totals, FY1981-FY1985

FY1981	FY1982	FY1983	FY1984	FY1985
N/A	42%	2.3%	2.7%	5.3%

SOURCE: EEOC Office of Program Operations Annual Report, FY1985.

TABLE 4B

EEOC Cases Over 300 Days Old, Total and as Percentage of Pending Inventory at End of Period, for Selected District offices, FY1985

	Number of 300-day-old Cases	Pending Inventory at End of Period	Percent of Pending Cases 300 Days Old
Birmingham (AL)	2	490	.4%
Chicago (IL)	560	2,095	26.7%
Houston (TX)	223	2,328	9.6%
Los Angeles (CA)	451	2,761	16.3%
New York (NY)	456	1,714	26.6%
St. Louis (MO)	106	1,050	10.1%

SOURCE: EEOC District Office Performance Indicator Quarterly Reports, Fourth Quarter FY1985

TABLE 5A

EEOC: Number of People Benefited and Amount of Dollar Benefits, National Totals, FY1981-FY1984

	FY1981	FY1982	FY1983	FY1984
People Benefited	38,114	51,886	64,581	25,578
Dollar Benefits (000)	$91,711	$101,397	$104,500	$107,057

SOURCE: Equal Employment Opportunity Commission Annual Report, FY1981; and EEOC Field Operations Report, FY1984.

EEOC Natl. Benefits for Discrimination Victims:

Dollar Amount and Number of People Benefited, FY1980–FY1985

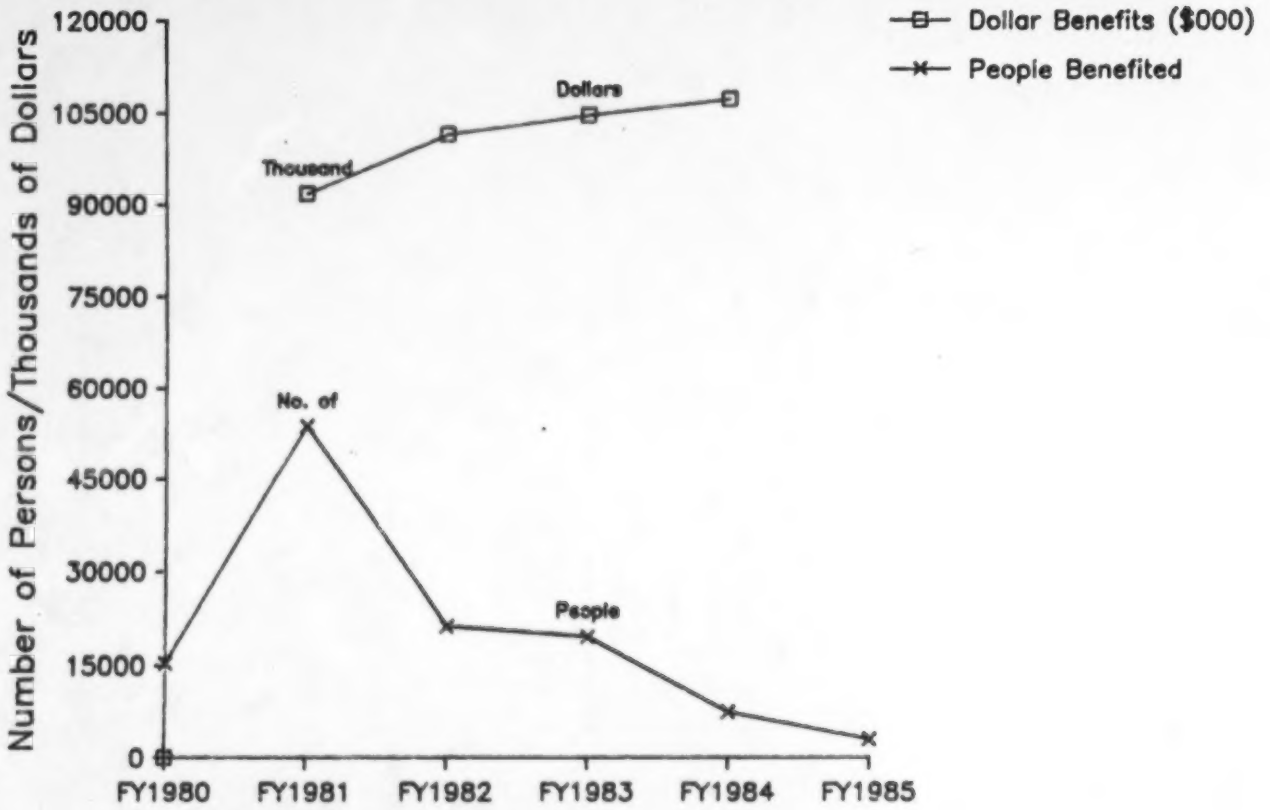


TABLE 5B

EEOC: Number of People Benefitted and Amount of Dollar Benefits, for Selected District Offices, FY1985

District Office	People Benefitted	Dollar Benefits (000)
Birmingham (AL)	240	$1,464,802
Chicago (IL)	239	$1,749,384
Houston (TX)	568	$2,403,413
Los Angeles (CA)	4,237	$7,240,677
New York (NY)	128	$1,235,412
St. Louis (MO)	369	$1,944,407

SOURCE: EEOC District Office Performance Indicator Quarterly Reports, Fourth Quarter FY1985.

TABLE 5C

EEOC: Number of Persons Benefited Monetarily, FY1980-FY1985

Fiscal Year	Number of Persons Benefited Monetarily
FY1980	15,328
FY1981	53,688
FY1982	21,187
FY1983	19,498
FY1984	7,409
FY1985 1/	2,964

NOTE: Reporting Period: 10/1/84 through 3/31/85.

SOURCE: EEOC District Office Summary Reports (cited in: Women Employed, "Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration" (1986)).

EEOC Number of Persons Benefited Monetarily, FY1980–FY1985

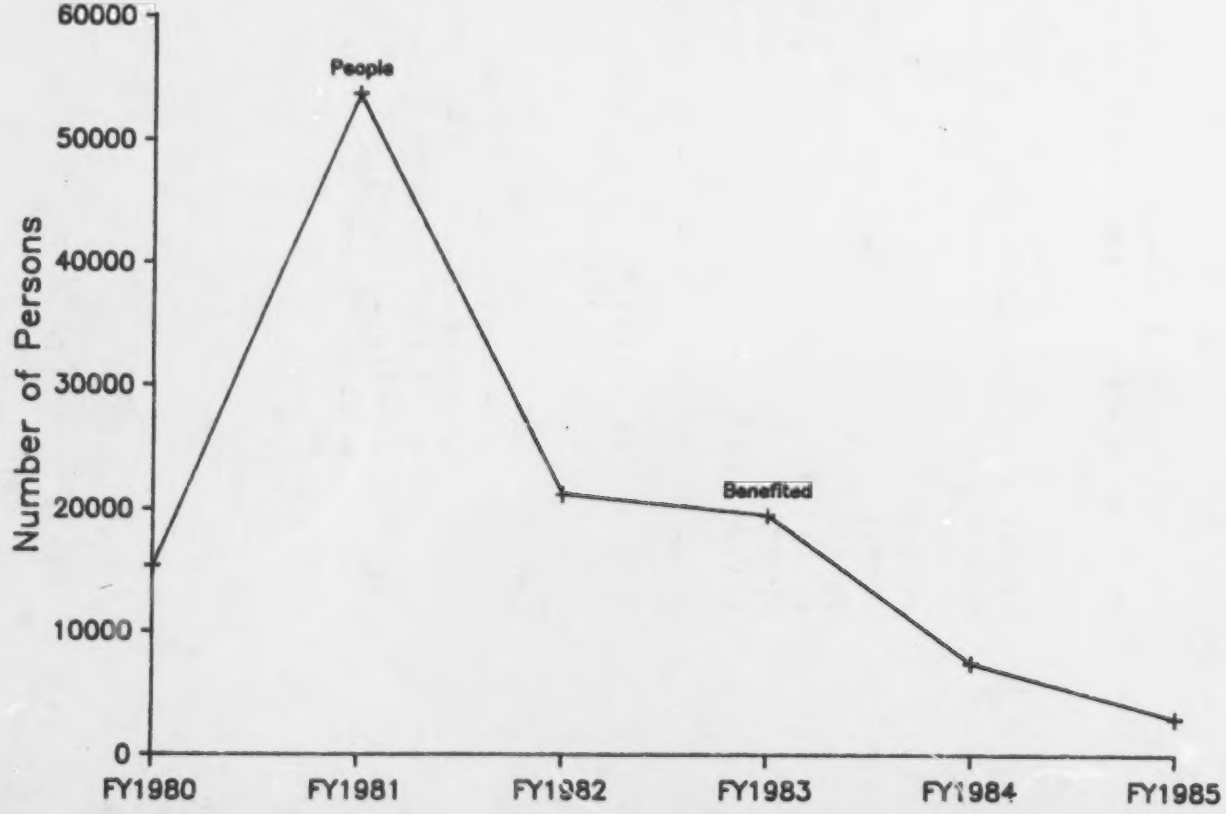


TABLE 6

EEOC Unsuccessful Conciliations,
National Totals, FY1981-FY1985

	FY1981	FY1982	FY1983	FY1984	FY1985
Total Closures	N/A	67,052	74,441	55,034	62,494
Unsuccessful Conciliations					
Number	1,999	1,632	2,162	1,603	1,621
Percent of Closures	N/A	2.4%	2.9%	2.9%	2.6%

SOURCE: Equal Employment Opportunity Commission Annual Report, FY1981; and EEOC Office of Program Operations Annual Report, FY1985.

TABLE 7A

EEOC Systemic Charges Filed:
National Totals, FY1981-FY1985

	FY1981	FY1982	FY1983	FY1984	FY1985
Systemic Charges	20	1	11	19	5

SOURCE: Equal Employment Opportunity Commission.

TABLE 7B

Number and Status of EEOC Systemic Charges Filed,
for Selected District Offices, FY1985

District Office	TOTAL No. of Systemic Cases	Current Status				
		In Negotiation	Under Investigation	In Litigation	Subpoena Enfcmt.	Other
Birmingham (AL)	5	2	1	-	1	1
Chicago (IL)	8	2	5	1	-	-
Houston (TX)	8	1	7	-	-	-
Los Angeles (CA)	6	2	4	-	-	-
New York (NY)	5	-	4	-	1	-
St. Louis (MO)	7	1	5	1	-	-

SOURCE: EEOC District Offices.

TABLE 7C

Status of EEOC Systemic Charges Filed,
for Selected District Offices, as of FY1985

District Office	Case Number	Date Filed	Current Status
Birmingham (AL)	1	5/28/80	Negotiation
	2	10/6/80	Considering Withdrawal
	3	10/7/80	Investigation
	4	2/25/81	Subpoena Enforcement
	5	10/6/81	Negotiation
Chicago (IL)	1	8/29/78	Negotiation
	2	4/2/80	Negotiation
	3	9/6/79	Litigation
	4	11/20/78	Investigation
	5	6/27/84	Investigation
	6	9/30/80	Investigation
	7	8/21/84	Investigation
	8	3/8/79	Investigation
Houston (TX)	1	7/79	Investigation
	2	5/80	Investigation
	3	10/80	Negotiation
	4	10/80	Investigation
	5	10/80	Investigation
	6	10/80	Investigation
	7	10/80	Investigation
	8	10/84	Investigation
Los Angeles (CA)	1	10/9/79	Negotiation
	2	12/4/79	Negotiation
	3	6/12/80	Investigation
	4	10/7/80	Investigation
	5	3/10/81	Investigation
	6	9/12/84	Investigation
New York (NY)	1	4/83	Investigation
	2	5/2/83	Subpoena Enforcement
	3	11/8/83	Investigation
	4	1/20/84	Investigation
	5	6/18/84	Investigation
St. Louis (MO)	1	6/11/80	Investigation
	2	1/84	Negotiation
	3	9/30/81	Investigation
	4	8/24/84	Investigation
	5	8/8/85	Investigation
	6	4/2/84	Investigation
	7	9/27/79	Litigation

SOURCE: EEOC District Offices.

TABLE 8A

EEOC Class Suits: Total, and as Percentage
of All EEOC Suits, National Totals, FY1979-FY1985

	FY1979*	FY1980*	FY1981**	FY1982	FY1983	FY1984	FY1985
All EEOC Suits	245	326	368	164	136	222	286
Class Suits							
Number	154	218	166	69	75	112	155
Percent of All Suits	62.9%	66.9%	45.1%	42.1%	55.1%	50.5%	54.2%

NOTES: * Figures are projections based on type of recommendations received by EEOC Office of General Counsel. Complete data on type of cases filed were not maintained by the Office of General Counsel prior to FY1982.
** Figures are projections based on a sample of filings during FY1981.

SOURCE: Equal Employment Opportunity Commission.

TABLE 8B

EEOC Class Suits: Total, and as Percentage of All Suits, for Selected District Offices, FY1985

District Offices	All Suits	Class Suits	Class Suits as Percent of All Suits
Birmingham (AL)	33	2	6.1%
Chicago (IL)	37	20	54.1%
Houston (TX)	39	4	10.3%
Los Angeles (CA)	36	3	8.3%
New York (NY)	29	2	6.9%
St. Louis (MO)	20	4	20.0%

SOURCES: EEOC Performance Indicator Quarterly Reports, Fourth Quarter FY1985.

National EEOC: Class Suits, FY1979–FY1985

As Percentage of All EEOC Suits

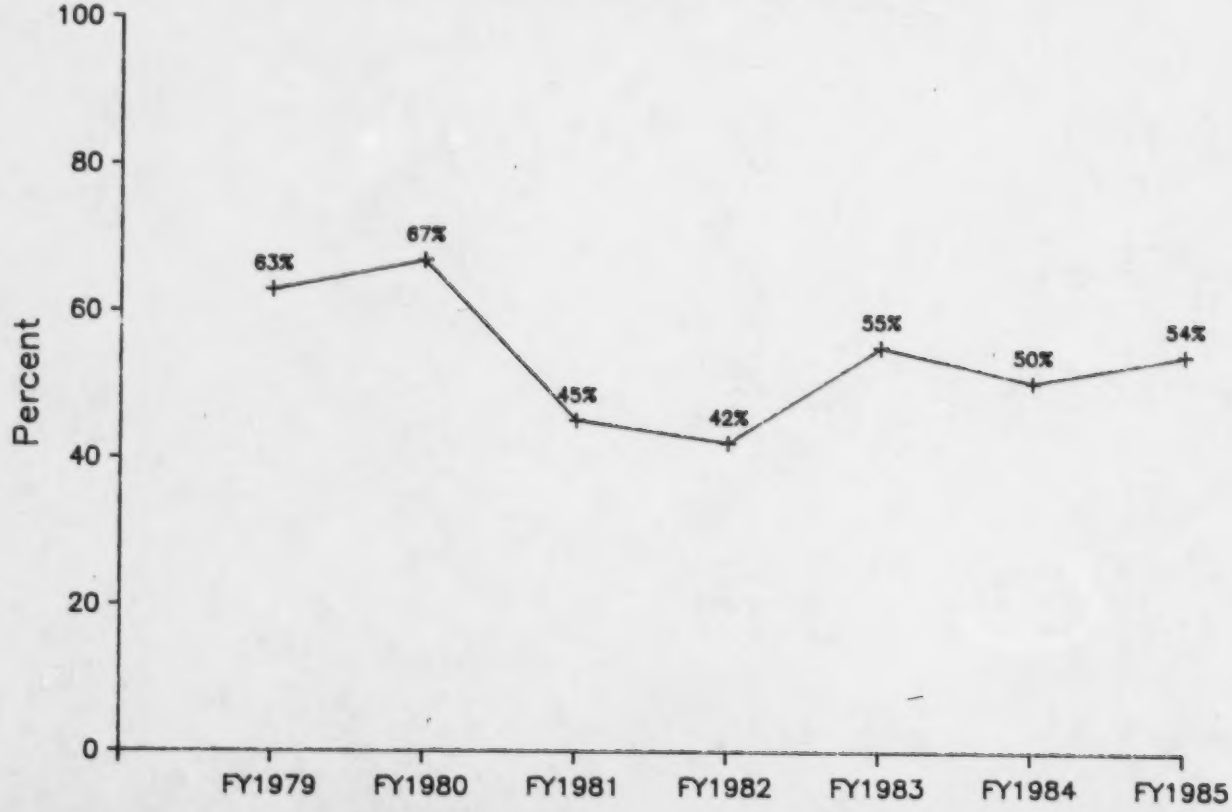


TABLE 9

National EEOC: State & Local Fair Employment Practices Agencies (FEPA) Receipts and Closures, FY1981-FY1985

	FY1981	FY1982	FY1983	FY1984	FY1985
FEPA Receipts	36,069	41,465	46,306	4. 418	52,576
FEPA Closures					
Number	37,145	30,062	42,026	N/A	N/A
Percent of Receipts	103.0%	72.5%	90.8%	-	-

NOTE: N/A Not Available

SOURCES: Equal Employment Opportunity Commission Annual Reports, FY1981-FY1983; and EEOC Office of Program Operations Annual Report, FY1985.

TABLE 10

Selected EEOC District Offices:
State & Local Fair Employment Practices Agency (FEPA)
Charges Processed, and Rejections
for Failure to Meet Substantial
Weight Requirements, FY1985

District Offices	FEPA Charges Processed	FEPA Substantial Weight Rejections	Rejections as Percent of Charges
Birmingham (AL)	0	N/A	N/A
Chicago (IL)	2,182	20	.9%
Houston (TX)	1,181	33	2.8%
Los Angeles (CA)	3,317	0	.0%
New York (NY)	8,118	16	.2%
St. Louis (MO)	1,457	8	.5%

SOURCE: Equal Employment Opportunity Commission.